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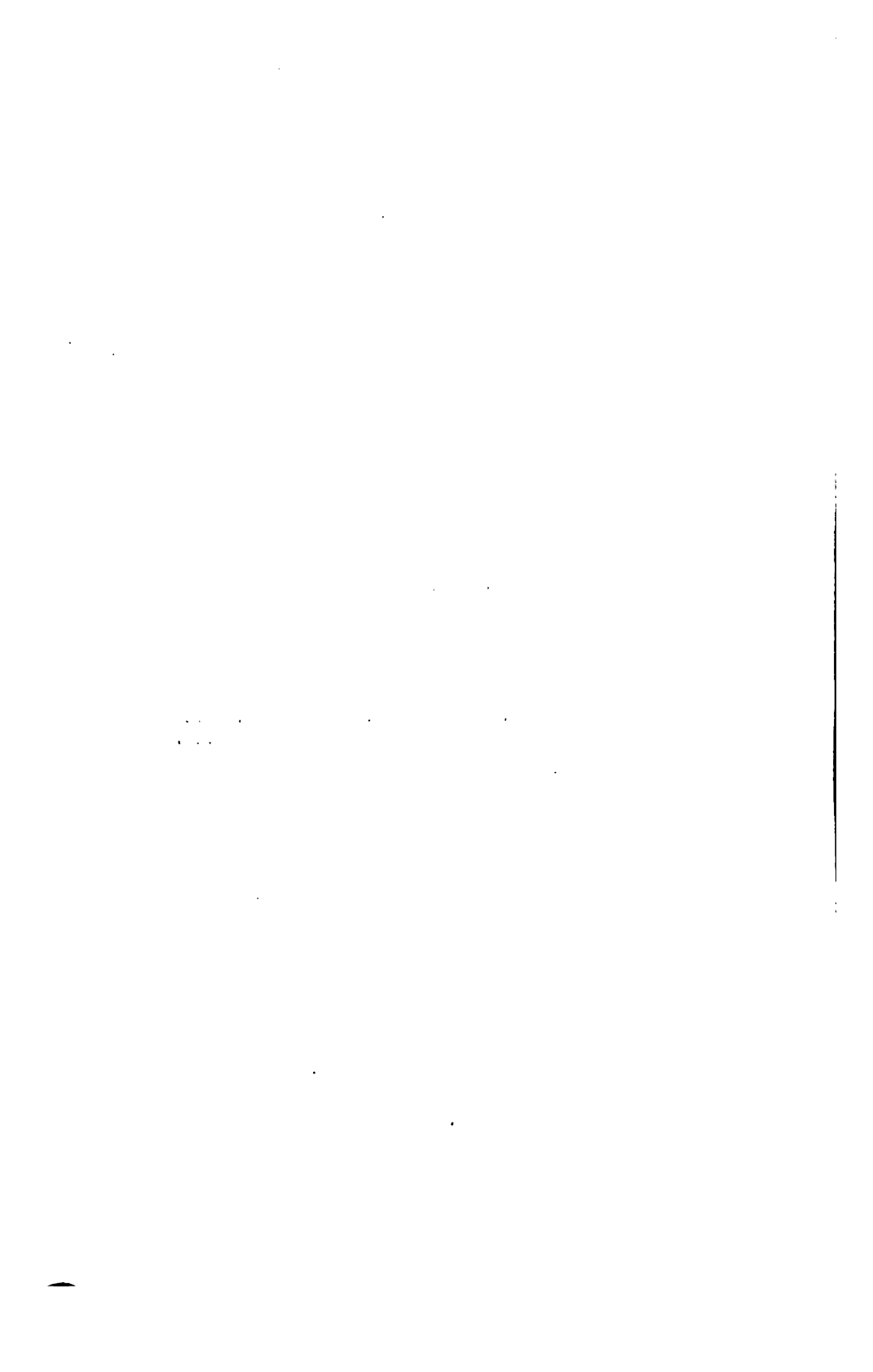
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O. A. DUNIWAY,
Stanford University, Cal.

LEADING CASES AND OPINIONS
ON
INTERNATIONAL LAW.



LEADING CASES AND OPINIONS
ON
INTERNATIONAL LAW,

COLLECTED AND DIGESTED FROM

English and Foreign Reports, Official Documents,
Parliamentary Papers, and other Sources.

WITH

NOTES AND EXCURSUS,

CONTAINING THE VIEWS OF THE TEXT WRITERS ON THE TOPICS
REFERRED TO, TOGETHER WITH SUPPLEMENTARY CASES,
TREATIES, AND STATUTES.

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PREFACE TO THE SECOND EDITION.

IN this Edition, both the text and appended notes have been revised, and brought, as far as possible, down to the present time. A few of the cases cited in the former Edition have been omitted, whilst many new cases have been added.

P. C.

January, 1892.

PREFACE.

THERE is some tendency on the part of English lawyers to regard that body of custom and convention which is known as International Law, as fanciful and unreal ; as a collection of amiable opinions, rather than as a body of legal rules. The text writers have much to answer for in this respect. Their real function is to record and collate existing usage. The function which they have striven to assume has been that of authorship. They frequently prescribe, not what is, but what they think ought to be, the practice of nations. Rules originating thus, necessarily command but scanty reverence ; and perhaps nothing has tended more to lessen the esteem in which International Law is held than the misapprehension which has been thus begotten. The truth is, however, that a very large portion of International Law rests on authority as trustworthy as that which commands the homage of the English lawyer. The great body of the rules comprising the maritime Law of Nations, together with many fundamental rules in other departments, may be found in the judgments and decisions of International tribunals, such as Boards of Arbitration and Courts of Prize, some of them presided over by judges fully as eminent as those of the Common Law. Even where such authority fails, it is still possible to draw on such sources as official documents and records, and opinions given by official jurists to their own Governments on matters of international concern. My first object in the present volume has been to bring out how much of the Law of Nations exists in this shape. With this object I have omitted in the text all reference to any but judicial and official opinions, reserving those of the text writers for explanatory notes. I am quite aware that this continual reference to

case law as illustrative of topics, which sometimes seem scarcely to come within the domain of the Courts, may occasionally appear strained and awkward. Thus, the insertion of the case of the *Cherokee Nation v. The State of Georgia*, as an authority on the subject of State character, of the cases of the *Eliza Ann* and the *Teutonia* on the subject of "Declaration of War," may seem to give an untrue idea of the real origin and foundation of the rules of International Law on these subjects. My purpose, however, was not so much to indicate the origin of such rules, as to show how far they were sanctioned by the decisions of recognized legal authorities.

My other object has been to publish a selection of illustrative cases which may serve as a useful companion volume to existing text-books. In order to preserve, as far as possible, the continuity of the subject, I have occasionally inserted cases and dealt with matters which are perhaps already treated of in ample detail.

I have found it necessary to add to many of the cases and opinions, notes explaining or collating the principal points of the case, or explaining its relation to some general topic of which it forms a part. In framing these notes I have drawn freely on standard text-books, such as those of Hall, Kent, and Wheaton, and occasionally Heffter. This mode of treatment no doubt involves some repetition. Thus, in treating of enemy property in war, it was impossible to avoid trenching to some extent on the subject of neutral liability. I can only claim to have avoided this where possible.

I have ventured to use the word "case" in its widest sense; not in any way limiting it to disputes that have been the subject of forensic litigation. Some transactions which struck me as bearing on topics treated of, but which I felt could not legitimately be classed either under cases or opinions, nor yet be conveniently embodied in notes, I have thrown into the form of Excursus. It appeared to me convenient to place each Excursus immediately after the topic to which it was most nearly related.

There are some topics which are common to the two depart-

ments of Public and (if I may venture on using the expression) Private International Law. Some of these I thought it best to reserve for a smaller volume of cases on the Comity of Nations.

I must take this opportunity of expressing my great indebtedness to Mr. J. Z. Laurence for much valuable assistance in the compilation of the present volume. I have also to acknowledge the courtesy by which I have been permitted to reprint in this volume the substance of several articles previously published in the Law papers.

P. C.

4, KING'S BENCH WALK, TEMPLE, E.C.,
October, 1885.

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LEADING CASES AND OPINIONS

ON

INTERNATIONAL LAW.

PART I.—PEACE.

STATES.

THE CHEROKEE NATION v. THE STATE OF GEORGIA.

Temp. 1829.

[5 PETERS' REPORTS, 1.]

Case.] In 1828 and 1829 two statutes were enacted by the Legislature of the State of Georgia affecting the territory of the Cherokee Indians. This territory had been assured to them by solemn treaties on the part of the United States. It was alleged that the effect of these local laws would be to parcel out the Cherokee territory and to subject the Cherokee nation to the jurisdiction of the State of Georgia, contrary to the treaties entered into with the United States. Proceedings were thereupon instituted in the Supreme Court of the United States to restrain the State of Georgia from giving effect to these Acts and from executing the laws of Georgia within the Cherokee territory. The legislation of the State of Georgia admittedly conflicted with the various treaties under which the Cherokee nation had been induced to part with portions of its land. Each of these treaties contained a solemn guarantee of the residue. It appeared, however, that the Court would not have jurisdiction to restrain such acts, unless it could be shown

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that the Cherokee nation was either a "foreign State" or "a State of the Union," within the grant of the judicial power to the United States.

Judgment.] Marshall, C.J., in delivering the judgment of the majority of the Court, dealt in the first place with the question whether the Cherokee nation constituted a distinct political society. It was held that they were entitled to claim this character, inasmuch as they had been so treated from the time of the settlement of the country, numerous treaties having recognized them as a people capable of maintaining the relations of peace and war, and of being responsible in their political character for any violation of their engagements, and for aggressions committed on United States citizens by any individual member of their community.

On the question whether they constituted a "foreign State," however, the learned Chief Justice called attention to the fact that the Cherokee territory constituted part of that belonging to the United States, and that by their treaties the Cherokee nation acknowledged themselves to be under the protection of the United States. Hence he concluded that their relation to the United States resembled rather that of a ward to his guardian; that they looked to the United States Government for protection; and that foreign nations considered them as being so completely under the sovereignty of the United States, that any attempt to acquire their lands would be considered by all as an invasion of United States territory.

Moreover, by the Constitution of the United States, power was given to Congress to regulate commerce with "foreign nations, the several States and the Indian tribes," and therefore it seemed that the Constitution did not comprehend Indian tribes under the general term "foreign nations."

In accordance with the views of the majority of the Court, the bill was, therefore, dismissed for want of jurisdiction, on the ground that the Cherokee nation did not constitute either a foreign State, or a State of the Union, within the meaning of the grant of judicial power to the United States.

Thompson, J., who dissented, pointed out in his judgment that the terms State and Nation implied a body of men united together to procure their mutual safety and advantage by means of the union. Every nation which governed itself without any dependence on a foreign power was a sovereign State. In this category ought to be included those States that had bound themselves to another more powerful, although by an unequal alliance. Provided the inferior ally reserved to itself the sovereignty or the right to govern its own body, it ought to be considered an independent State. The Cherokee nation had always been dealt with as a sovereign State by the Government of the United States; they had been admitted and treated as a people governed solely and exclusively by their own laws, usages and customs within their own territory, claiming and exercising exclusive dominion over the same, yielding up by treaty from time to time portions of the land, but still claiming absolute sovereignty and control over what remained unsold. After a further review of the facts, the learned Judge concluded that there was as full and complete recognition of their sovereignty as if they were the absolute owners of the soil. It appeared from the cases on the subject that a foreign State judicially considered was one under a different jurisdiction or government, without any reference to its territorial position. On these grounds he was unable to perceive any sound and substantial reason why the Cherokee nation should not be considered a foreign State. Story, J., concurred with Thompson (a).

The Cherokee Nation v. The States of Georgia, 5 Peters, 1.

On the subject of international Personality, it is necessary to look rather to existing political arrangements, and to recognized usage, than to the decisions of municipal tribunals. Nevertheless, the leading case, though dealing mainly with a question peculiar to the United

(a) As to the present status of the Indian tribes, see Wheaton by Boyd, p. 60.

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States organisation, yet contains a fair statement of the conditions which go to make up a "State." It seems to have been admitted by all members of the Court that any organised community, which in matters internal was governed by its own laws and customs, and which in matters external was recognised as capable of entering into treaties, maintaining relations of peace and war, and as being responsible for aggression or violation of its engagements, was *prima facie* entitled to be regarded as a State. In the view of the majority of the Court, however, the claim of the Cherokee nation to the character of a separate State, was rebutted by the fact that the Cherokee territory constituted part of that belonging to the United States, and by the fact that the Cherokees had admitted themselves to be under the United States' protection. As a municipal tribunal, the Court was also bound to give effect to the presumption afforded by the wording of a clause in the United States constitution.

The views of the text-writers substantially correspond with these principles. According to Mr. Hall, the requisites of a sovereign State are that it should be permanently established for a political end, in full possession of definite territory, and independent of external control (b). "For all the purposes of International Law," says Phillimore, "a State may be defined to be a people permanently occupying a fixed territory, bound together by common laws, habits, and customs into one body politic, exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making peace and war and of entering into international relations with other communities" (c).

In order, however, that a State may be regarded as a normal member of the community of nations, it is further necessary that it should be recognized by other States. Thus Wheaton says: "But if it desires to enter into that great society of nations, all the members of which recognize rights to which they are mutually entitled, and duties which they may be called on reciprocally to fulfil, such recognition becomes necessary to the complete participation of the new State in all the advantages of this society. Every other State is at liberty to grant or refuse this recognition, subject to the consequences of its own conduct in this respect" (d). In the case, however, of a State of sufficient power or importance to influence extensively the relations of other States, recognition must ultimately follow from the establishment of *de facto* sovereignty, although some States may be more prompt in according such recognition than others. Prior to 1720

(b) See Hall, p. 18.

(c) See Phillimore, I., p. 81.

(d) See Wheaton, by Lawrence, p. 39.

doubts were entertained by the nations of Christendom as to the lawfulness of recognizing or of maintaining any pacific intercourse with the Porte. In 1720 a Russian Minister for the first time took up his residence at Constantinople. This seems to have paved the way for recognition by and intercourse with other nations; whilst in the end, curiously enough, the maintenance of the Ottoman Empire became ultimately one of the leading principles of European diplomacy. It was not until 1856, however, that Turkey was formally admitted to "the Public Law of Europe," in the sense of participating not merely in the principles of International Law, but also in the provisions of the European code (*f*). The International Association of the Congo, which was formed in 1879, and which has since developed into the Congo State, was recognised by the United States of America as a "friendly Government" in April 1884, by Germany as a "friendly State" in November 1884, and by Great Britain as a "friendly Government" in December 1884. The question of the recognition of new States formed by secession from an already existing State will be dealt with hereafter (*g*).

A State may cease to exist when it becomes voluntarily or compulsorily absorbed in another State. Its former corporate capacity will then cease and its members will become a part of another society, which will succeed to all the territorial rights and obligations of the State so absorbed. But a State may undergo the most important and extensive changes without losing its personality. It may be stripped of a portion of its territory or subjects; it may change its form of government from a monarchy to a republic, or from a republic to a despotism; its influence and authority in the council of nations and even its external relations may be materially affected, and yet these changes will not *per se* involve any loss of its personality, or a forfeiture or discharge of its international rights or obligations. In *Terrett v. Taylor* (9 Cranch, 43) it was laid down by Story, J., that the dissolution of the regal government in the United States of America, and the substitution of a republican form of government, worked no change in existing rights, and that the Republic merely succeeded to the rights of the British Crown.

A distinction is sometimes drawn between normal and abnormal international persons (*h*). It is suggested that the former category includes only those recognized members of the family of civilized nations, which are also fully sovereign and independent. It was to this group of States that the Ottoman Empire was admitted by the

(*f*) A convenient epitome of the treaty relations of the Ottoman Empire and other European nations, will be found in Phillimore, *International Law*,

Vol. I., pp. 87—93.

(*g*) See p. 16, *infra*.

(*h*) See Holland, p. 326.

Treaty of Paris in 1856. It is as between these normal international persons that the theory of equality, and the most complete application of the rules of International Law, may be said to prevail. There is, however, some ground for thinking that, so far as European affairs are concerned, the theory of equality is now giving place to a recognized primacy on the part of the Great Powers (i). In America the primacy of the United States, in matters of continental concern, has been a recognized principle since the enunciation of the Monroe doctrine in 1823 (k).

Amongst abnormal international persons are classed Semi-sovereign and Protected States (l), and States which, though fully independent, are yet, by reason of their difference of civilization or their removal from Western influences, not fully regarded as the subjects of International Law. Increased facilities for intercourse, however, and the rapid spread of Western ideas, are gradually bringing such nations within its sphere.

Even this enumeration does not exhaust the subjects of International Law. Its rights and duties occasionally extend to organizations which are not in any sense States. Such is the case with revolted provinces or colonies, whose belligerency has been acknowledged by other States, and who are consequently entitled to issue commissions, to institute blockades, and to exercise the right of visit and search and other rights affecting neutral States, but are, on the other hand, bound by the ordinary obligations of a civilized power whilst carrying on the war. Such was the position of the Confederate States during the American Civil War.

Occasionally also we find trading corporations invested with some of the rights and obligations of International Law, mainly in regard to the exercise of internal dominion, the acquisition of new territory, and the right of making peace and war within certain limits. Such was formerly the position of the East India Company, and also of the International Association of the Congo at one stage of its career (m). The North Borneo Company may perhaps be referred to as affording a present illustration of this type of international personality, although the rights which it enjoys under its charter from the Crown are of a more circumscribed character (n).

With the varieties of internal organization, or with the terms in

(i) See Lawrence, p. 191.

(k) See Wheaton by Boyd, p. 94.

(l) See p. 10, *infra*.

(m) The International Association of the Congo has since developed into the Congo Free State, under the presidency of the King of the Belgians, and the guarantee of the Great Powers. See

Proceedings of the Berlin Conference, Parliamentary Papers, Africa, No. 4, 1885.

(n) For further information on this subject, see "The New Ceylon," by Joseph Hatton, in which will be found the charter, dated 1st Nov., 1881.

which States formerly distinct have become one, with the various forms of union, personal, real, incorporate, federal (*o*), it would seem that International Law is really not concerned. It looks only to the common international representative. If various States, locally distinct, have a common government to represent them internationally, they constitute strictly but one international person.

It may not be out of place, however, to point out that publicists recognise five forms of Union. These are:—(1) Personal Union, where States are temporarily united by subjection to one sovereign, the Union here being dependent on the continuance of the dynasty; such was the case with Great Britain and Hanover between 1714 and 1837. (2) Real Union, where two or more States are perpetually united under one sovereign; an illustration of which may be found in the present relation of Austria and Hungary. (3) Incorporate Union, where two or more States are united in such a way that the external and internal sovereignty of each is completely merged in the sovereignty of the united community; such is the case with England and Scotland in relation to the United Kingdom. (4) Federal Union (*Bundestaat*), where several States are united in such a way that the management of the external affairs of the union is absolutely vested in a Supreme Federal Power, although as to internal matters, each of the States composing the union retains its sovereignty within the sphere allotted to it by the Constitution; such is the case with the United States of America, and with the United States of Rio de la Plata. (5) Lastly, the Union may take the form of a Confederacy of States (*Staatenbund*); this occurs where several States unite for the purposes of mutual assistance and defence but without derogating from the individual sovereignty of each, except so far as is strictly necessary for the common object of the union as defined by the pact (*p*). The Germanic Confederation, as constituted under the Treaty of Vienna, 1815, and the first Act of 1820, affords an instance of this type of international Union; the personality of the different States composing the union was, for the purposes of International Law, preserved; each State retained within certain limits the power of contracting alliances, of

(*o*) An excellent account of these forms of organization will be found in Wheaton, by Boyd, pp. 63 to 81; see also Twiss, Vol. I., c. iii.

(*p*) The difference between Federal and Confederate Union from the point of view of Constitutional Law, is said to be this,—that in the former the Federal Executive, within the sphere

allotted to it, acts in each separate State in its own right and not through the medium of the Government of that State; whilst in the latter, the executive organ of the Confederation can only act through the Governments of the various States composing the Confederacy.

8 *Cases and Opinions on International Law.*

maintaining separate legations, and of making peace and war (*q*); and all members of the league continued to be governed in their relations with independent States by the general International Law. After the war of 1866 and the Treaty of Prague, the Germanic Confederation was superseded by the North German Confederation, under the leadership of Prussia. After the Franco-Prussian War of 1870, a new Confederation, under the presidency of Prussia, was formed, under the name of the German Empire, the constitution of which was promulgated at Berlin on April 16, 1871. Under the new constitution the Emperor represents the Empire internationally, and has the right to declare war and conclude peace in the name of the Empire, to enter into alliances and other treaties with foreign Powers, and to accredit and receive ambassadors. In so far as treaties with foreign States have reference to affairs within the jurisdiction of the Imperial Legislature the consent of the Council of the Confederation is requisite for their conclusion, and the sanction of the Diet for their coming into force. The consent of the Council is also necessary for the declaration of war in the name of the Empire, except in the case of an attack being made on its territory or coast. Rights of separate legation are still retained by certain members of the union, but this extends only to matters not expressly reserved to the Imperial Government.

THE "CHARKIEH."

Temp. 1873.

[L. R. 4 A. & E. 59.]

Case.] The "Charkieh" was an Egyptian steamer belonging to the Khedive, and was arrested by the order of the Court of Admiralty for running down a vessel in the Thames on the 19th of October, 1872. Application was made to restrain further proceedings on the ground that the "Charkieh" was an Egyptian Government vessel, and as such not amenable to the jurisdiction of the Court of Admiralty. It appeared that the vessel, although carrying the flag of the Ottoman Empire, had come with cargo to England, and had been entered at the Customs like an ordinary merchant ship, and that at the time of

(*q*) See Wheaton, by Boyd, p. 68.

the collision she was under charter to a British subject, and advertised to carry coals to Alexandria.

Judgment.] Sir Robert Phillimore in his judgment considered two questions: (1) whether the "Charkieh" could be said to be the property of a sovereign prince, and (2) whether, assuming that the Khedive enjoyed the status of a sovereign prince, the vessel could under the circumstances still claim immunity from jurisdiction. (An account of the judgment so far as regards the question of the immunity of the vessel will be found under "Public Vessels," p. 52.) On the subject of the status of the Khedive of Egypt, Sir Robert Phillimore, in giving judgment, stated as the result of an historic inquiry into the subject, that in the firmans granted by the Porte to the Khedive, Egypt was invariably spoken of as one of the provinces of the Ottoman Empire; that the Egyptian army was regulated as part of the military force of the Ottoman Empire, that the taxes were imposed and levied in the name of the Porte, that the treaties of the Porte were binding on Egypt, that she had no separate *jus legationis*, and that the flag for both the army and the navy was the flag of the Porte. All these facts, according to the unanimous opinion of accredited writers, were inconsistent and incompatible with those conditions of sovereignty which were necessary to entitle a country to be ranked as a member of the great community of States. With reference to the fact that the office of Khedive was hereditary, that did not confer on him the right of making war and peace, of sending ambassadors or of maintaining a separate military or naval force, or of governing at all except in the name and under the authority of his sovereign.

The Charkieh, L. R. 4 A. & E. 59.

The political position of Egypt has undergone considerable modification since the date of the judgment in the "Charkieh." By the firman of the 8th of June, 1878, the right of concluding treaties and maintaining armies was granted to Ismail I. by the then Sultan. This increased independence was not destined to last long. After

the deposition of Ismail in 1879, the government of Egypt was conducted under the supervision of two controllers-general, one nominated by Great Britain and the other by France, in accordance with a decree of the Khedive of the 10th of November, 1879. In the summer of 1882 an insurrection took place, the object of which was the abolition of the foreign control in Egypt. Great Britain, however, intervened, and the authority of the Khedive was ultimately restored. Subsequently, in January, 1883, a decree was promulgated abolishing the joint control; and in November, 1883, an English financial administrator was appointed. In October, 1885, a convention was entered into between Great Britain and Turkey, in pursuance of which the affairs of Egypt were placed under the control of two Commissioners, nominated by these Powers. In May, 1887, a further convention was arranged, but this was not ratified by the Porte, with the result that the British occupation has continued ever since under the Convention of 1885. In view of the continuance of the English occupation, the present international status of Egypt must be regarded as somewhat anomalous. In the case of *Abd-ul-Messih v. Farra* (L. R. 13 App. Ca. 431), Lord Watson, referring to the position of foreigners in Egypt, remarked that it was not British territory, but the possession of a foreign Power and subject to the sovereignty of the Porte; certain privileges, however, had been conceded by treaty to residents in Egypt, whether British or foreign, subject to their names being inscribed in the register kept for that purpose, and such persons enjoyed immunity from territorial rule and taxation; they constituted a privileged society living under a foreign law, although on Egyptian soil (*qq*).

With regard to "Semi-sovereign" States in general, these are commonly defined as "States which are not free in their external relations, but which otherwise enjoy full internal independence." This definition is not altogether accurate, inasmuch as in some cases the internal independence is also affected. Strictly, however, it is the limitation on external freedom of action that International Law is alone concerned with. The limitations on external sovereignty may vary, but such States have usually no separate *jus legationis*, being represented only by diplomatic agents or consuls, no power of contracting separate treaties, or of making peace and war, without the consent of the State on which they are dependent. It follows that such States are only mediately and in a subordinate degree the subjects of International Law. For many purposes they are treated as part of some larger State and as represented by it in the community of nations. Still for certain purposes and under certain limitations they are recognised as possessing a separate status or personality. Thus, whilst they possess no separate

(*qq*) See p. 121, *infra*.

jus legationis, and whilst negotiations between them and foreign countries are usually conducted through the representatives of the suzerain or protecting State, or at least submitted for its approval, yet it is usual to accredit to them minor diplomatic agents, and to recognise them as separate international entities in questions of comity that affect the persons and property of their subjects in foreign countries, or strangers in their territory (*r*).

Although this may be taken as a fair description of the international status and position of typical semi-sovereign States, yet when we proceed to determine what States are of this character, we shall experience greater difficulty. Semi-sovereign States are sometimes said to comprise the following: (1) Protected States, (2) Tributary and Vassal States, (3) members of a system of Confederated States, and (4) States under the permanent guarantee of the Great Powers. But this classification is scarcely consistent with our statement of the conditions of a semi-sovereign State proper, inasmuch as some States fall within it, to which our statement of conditions would not apply. Having regard to the actual political arrangements that have subsisted and still subsist, it seems clear that there are many varieties of State organisation and relation, and that it is impossible to reduce these under any one system, or to draw clearly any line of demarcation between them. The question of Sovereign or Semi-sovereign, in the sense described, is really a question of fact, which has to be determined in each particular case. Thus, it may well be, that one State may place itself under the protection of another, without forfeiting in any degree its international personality. If, in such case, the former should retain its separate *jus legationis*, its separate flag, and its power to make peace and war irrespectively of its protector, then it would still be entitled to be regarded as a full member of the community of nations, notwithstanding that its power of external action might in some respects be limited by the treaty or alliance. Even tributary or vassal States have occasionally been regarded as possessing a full international personality. Thus the Kingdom of Naples was until 1818 regarded as a Vassal of the Holy See, but this without in any degree affecting its international status.

The United States of the Ionian Islands, which were placed under the protection of Great Britain by the Treaty of Paris, 1815, are frequently cited as a perfect specimen of a Half-sovereign State. Their constitution was regulated by a Convention signed at Paris in 1815, between Great Britain, Austria, Russia, and Prussia, and by a Constitutional Charter adopted by the native Legislative Assembly (*s*). The international character of these States, whilst under the British

(*r*) See Phillimore, I., p. 100.

(*s*) See Phillimore, I., pp. 101 to 106.

Protectorate, came under consideration in the case of the *Ionian Ships* (Spink's Prize Cases, p. 193). In this case, it appeared that during the war between Great Britain and Russia an Ionian vessel had been seized by a British cruiser and brought in for adjudication, on the ground of trading with the enemy; it was admitted that she was bound to a Russian port, but this port was not under blockade, nor did the cargo consist of contraband; the question of liability, therefore, depended on whether Ionian subjects stood in the same position as British subjects in regard to a Power hostile to Great Britain. The learned judge of the Admiralty Court (Dr. Lushington) held that Ionian subjects did not owe any general allegiance to Great Britain, but merely a limited obedience arising from treaty, and hence they were not subject to the obligations of British subjects; if Great Britain had a right, under treaty, of declaring war between the Ionian Islands and Russia, she had not done so; by the Law of Nations, Ionian subjects could not be regarded, in view of the mere relations that subsisted between them and Great Britain, as being in a state of war with Russia. Although the relation between the Ionian Islands and Great Britain has long since ceased, the Islands having been ceded to Greece in 1863, this judgment is worthy of note, as throwing light on the status of such communities in International Law. The status of the Wallachian Principalities formerly, and that of the Principality of Bulgaria now, afford a further illustration of the conditions of semi-sovereignty. On the other hand, the position of Eastern Roumelia under the treaty of Berlin 1878, prior to its virtual incorporation with Bulgaria in 1885, was rather that of an autonomous province than of a semi-sovereign State.

In the same category are sometimes classed members of a confederated system of States. Here, under the terms of the Union, the individual States composing it, may have a separate *jus legationis*, and even a right of making peace and war, subject to conditions imposed in the general interest of the union. The Germanic Confederation, as previously described, belonged to this type of State organization (t). Even under the present constitution of the German Empire, some members of the Union enjoy the right of receiving foreign ministers, and of accrediting their own ministers to foreign courts. In respect to some of the German States, the British Ambassador accredited to the German Empire, acts also as Minister Plenipotentiary to the local State; such is the case with Anhalt and Brunswick. To other members of the Union, Great Britain accredits a separate minister, as in the case of Bavaria; or a *chargé d'affaires*, as in the case of Baden.

(t) See Wheaton, by Boyd, p. 68, and p. 7, *supra*.

There are, besides, certain permanently neutral States, which are sometimes, though it would seem with doubtful accuracy, classed under the head of semi-sovereign States. These are States which have been neutralized by the public act of Europe or of the Great Powers. They enjoy the advantage of having their immunity from attack guaranteed them by other Powers; but they are, on the other hand, subject to an obligation not to take part in any hostilities between other Powers, and they may not even during peace enter into engagements which might jeopardize their neutrality during war. Such has been the position of Switzerland since 1815, and of Belgium, under the treaty of 1839, superseding the original treaty of 1831 (*u*). But in all other respects, such States enjoy the attributes of full sovereignty (*x*).

The Treaty of Berlin of the 13th of July 1878, illustrates so well the various relations in which a dependent State may stand towards another State, that it may be worth while to refer briefly to some of the changes effected by it. By the provisions of this treaty, Eastern Roumelia was placed under the direct authority of the Porte, but was to have a Christian Governor-General; this officer was to be nominated by the Porte, with the consent of the parties to the treaty, and to hold office for five years; the province was also to enjoy administrative autonomy. Bulgaria was established as an autonomous tributary principality under the suzerainty of the Sultan, with a Christian government and a national militia; the Prince was to be chosen by the population of the principality, and his election confirmed by the Porte with the assent of the parties to the treaty, no member of the reigning families of Europe being eligible; difference of creed was to form no ground for civil or political disability; existing treaties between the Porte and foreign Powers were to remain in force, and the principality was to bear a portion of the public Turkish debt. Montenegro was recognized as an independent State; new territory was added to the principality, in return for which it was to bear a part of the public Turkish debt; difference of creed was to form no ground of disability; but the new State was not to have any ships or any flags of war. Serbia was recognized as an independent State, subject to the condition that difference of religion was not to be punished, and freedom of worship was to be assured to all persons; in return for an accession of territory Serbia also was burdened with a portion of the public Turkish debt. Roumania was declared independent, subject to the same conditions

(*u*) For an account of these permanently neutralized States, see Wheaton, by Boyd, pp. 551—560.

(*x*) On the subject of the international position of Belgium, Greece,

Luxemburg, Cyprus, Bosnia and Herzegovina, Tunis and Tripoli, and the Republics of San Marino, and Andorra, see Phillimore, Part II., ch. 2.

as Serbia, and an alteration was made in the territorial limits of the principality.

Roumania was declared a monarchy in 1881, and Serbia in 1882; so that these may now be said to have discarded their former character as "semi-sovereign States." In 1885, a revolution took place in Eastern Roumelia, and its union with Bulgaria was proclaimed. As the result of a conference of the signatory Powers of the Berlin Treaty, held at Constantinople subsequently, an imperial firman was issued by the Sultan in 1886, confiding the Government of Eastern Roumelia (with the exception of certain districts) to the Prince of Bulgaria, and providing for the appointment of a commission to modify the then existing constitution. The province has since for all purposes formed part of Bulgaria (y). In 1887, on the abdication of Prince Alexander of Battenberg, Prince Ferdinand of Coburg was elected by the Sobranje. The election was not, however, confirmed by the signatories of the Berlin Treaty.

THE UNITED STATES OF AMERICA v. M'RAE.

Temp. 1869.

[L. R. 8 Eq. 69.]

Case.] During the American Civil War the Confederate Government and their agents had consigned goods and remitted money to the defendant, who was apparently domiciled in England. The defendant having sold the goods and received the sale moneys, after the suppression of the rebellion a suit for an account was instituted against him by the United States Government in the English Courts. The defendant put in no answer, and simply left the plaintiffs to make out their title to relief. James, V.C., asked if the plaintiffs were willing to have the account taken as it would be taken between the Confederate Government on the one hand and the defendant

(y) The revolution in Roumelia, and its union with Bulgaria, afford another illustration of the growing force of the doctrine of nationality, and strike another blow at the theory that princes and diplomatists can parcel out nations at will. This event may aid statesmen in arriving at the conviction, long since

entertained by others, that political arrangements, if they are to be permanent, must follow the natural lines of cleavage, or, in other words, must take count of those ties, whether of race, place, language, religion, or common past and traditions, which go to make up a nation.

on the other. The plaintiffs declined to accept the decree in any form which would recognize the authority of the belligerent States or involve any privity with their agent.

Judgment.] The Vice-Chancellor, in giving judgment, stated that he would deal with the case as if the plaintiffs had been the Government of India, and the defendant an agent of insurrectionists there. What was at the outbreak of the rebellion the public property of the plaintiffs would still continue their property, and if at the end of the rebellion any such property capable of being identified could be traced to any person, the rightful owners would be entitled to apply for restitution. But moneys voluntarily contributed to the rebellion could not be recovered as moneys had and received to the use of the lawful Government. With regard to property taken by force from innocent persons the right of possession would still remain in them. The learned judge expressed an opinion that it was clear public universal law that any Government *de facto* succeeding another, succeeded to all the public property of the displaced Power. Any such public property would, on the success of the new or restored Power, *ipso facto* vest in the latter; and it would have the right to call to account any agent, debtor or accountant to or of the persons who had exercised the authority of the Government. But the right was a right of succession or of representation; it was not a right paramount, but was derived through the suppressed authority, and could only be enforced in the same way and to the same extent, and subject to the same correlative obligations and rights as if that authority were seeking to enforce it. Assuming this to be true, it was not open to the plaintiffs to claim from the agent, and at the same time repudiate all privity with him and his former principals. The learned judge expressed himself satisfied that the plaintiffs' claim, as they had framed it, was based on their paramount title to what they alleged to be their own property, in respect of which they sought to treat the possession of the defendant as the possession of the agent of public plunderers, and in this part of the

case the proceedings must wholly fail. There was no evidence that any moneys or goods of the plaintiffs (*i.e.*, of the plaintiffs in their own right, as distinguished from their right as successors of the Government which had been suppressed,) had ever reached the hands of the defendant, or that there were in his hands on or after the suppression of the rebellion any public moneys or goods which had become vested in the plaintiffs. On these grounds the suit was dismissed with costs.

The United States of America v. M'Rae, L. R. 8 Eq. 69.

Where a colony or province secedes or endeavours to secede from the State of which it has hitherto formed a part, various questions may arise for the consideration of other States and their tribunals. Omitting for the present the question of recognition of belligerency (*a*), two other questions present themselves: (1), assuming the revolt to be successful, when and with what consequences are other States bound or entitled to recognize the independence of the new State? (2), assuming that the parent State re-establishes its authority, how far does it succeed to the rights or responsibilities of the government overthrown?

With regard to the recognition of independence, Heffter suggests that this cannot be admitted until either the parent State itself recognizes the new order of things after having been indemnified, or, failing this, until the recovery of its ancient rights has become an impossibility (*b*). Other writers suggest as the condition of recognition, that the new State must be *de facto* independent, that it must be capable of maintaining relations of peace and war, and lastly that the parent State must have relinquished active efforts to re-establish its authority. Thus, in his "Letters on International Law," Historicus says: "As far as any practical rule can be deduced from historical examples, it seems to be this. When a sovereign State, from exhaustion or any other cause, has virtually and substantially abandoned the struggle for supremacy, it has no right to complain if a foreign State treat the independence of its former subjects as *de facto* established, nor can it prolong its sovereignty by a mere paper assertion of right. When, on the other hand, the contest is not absolutely or permanently decided, a recognition of the inchoate independence of the insurgents by a foreign State, is a hostile act towards

(*a*) As to the recognition of the see p. 134, *infra*.
belligerency of a revolting province, (*b*) See Heffter, § 23.

the sovereign State, which the latter is entitled to resent as a breach of neutrality and friendship" (c).

Assuming that the revolted province or State establishes its independence, it does not succeed to any of the obligations of the parent State which are of a personal character, such as treaties of alliance or succession, but it does succeed to such obligations as possess a local character. Some illustration of these principles may be found in the rules relating to the apportionment, in such cases, of State debts. If the debt was secured wholly on the local revenues of the province that has succeeded in establishing its independence, the whole liability ought to pass to the new State. If the debt was secured on special revenues partly derived from the seceding province, the latter becomes liable *pro rata*. For the general debts of the parent State, on the other hand, the new State is not liable, except in virtue of some special arrangement.

We have now to consider the position where the parent State, instead of succumbing, succeeds in re-establishing its authority. Here the question is generally only one of succession to right, and not of succession to liability (d). Debts and liabilities incurred by a rebel belligerent government have uniformly been repudiated. There are, however, certain rights, both proprietary and contractual, to which the parent State may lay claim. The principle deducible from the case of *The United States v. M'Rae*, and similar cases is, that the parent State, in such case, succeeds to all proprietary and other rights which were previously inherent in any rival government "in its character as government." This, however, is only a right of succession, and is subject to any lawful claims which neutrals holding such property may have against it. Subject to this, a neutral agent cannot resist the claim of the new government on the ground of its want of privity in title with that by which he was employed. In *The King of the Two Sicilies v. Wilcox* (1 Sim. N. S. 801), it appeared that from March 1848 to April 1849, the government of Sicily had been usurped by certain Sicilian subjects, and that the usurping government while in power had, through its agents in this country, entered into contracts for the purchase of two steamships; one of these had been delivered to the insurgents, but the other remained in this country; on his restoration to power, the King of Sicily commenced proceedings to recover the latter. The case came before the Court on the plaintiff's application for production of documents; this was resisted by the defendants on two grounds—1st, on the ground that the defendants held the documents as trustees for the persons by

(c) See Sir W. Vernon Harcourt's *Letters on International Law*, p. 9.

(d) This statement, perhaps, needs to be modified to this extent; viz., that

the succession to a right sometimes involves an incidental obligation, as in the case of *U. S. v. Prioleau*. See p. 18.

whom they were entrusted with the money; and 2ndly, on the ground that as to certain of the documents, their production would subject the defendants to criminal proceedings in Sicily. The Vice-Chancellor held that neither objection was tenable. He remarked that every government in its dealings with others necessarily partook in many respects of the character of a corporation; it must of necessity be treated as a body having perpetual succession; in the present case, those who, as constituting the government, had stood in the relation of *cestuis que trust* or of principals towards the defendants, ceased to fill that character when they ceased to be members of the government; the executive government being then at an end, the defendants had either ceased to fill the character of trustees or agents at all, or they had become trustees or agents for the plaintiff as the person then in possession of the supreme authority; he accordingly held that the plaintiff was entitled to an order for production.

On the other hand, in the case of *The United States of America v. Prioleau* (35 L. J. Ch. N. S. 7), it was held by Wood, V.-C., that the United States in claiming certain parcels of cotton of the value of 40,000*l.*, which had been deposited with the defendant by the Confederate Government as security for a contract entered into between the parties, must take the cotton subject to the defendant's lien under the agreement. The learned judge laid down, that Prioleau being a naturalized British subject had a perfect right to deal with the *de facto* government; the case could not be compared to that of a person taking the property of another with knowledge of the rights of that other, as suggested by counsel for the plaintiffs; such a principle could not be applied to international cases of this description, for if it could, there would be no possibility, during the existence of a government *de facto*, of any person dealing with such a government in any part of the world; subjects of other countries who treated with the existing government were entitled to every right which the government *de facto* could give them; the succeeding government could not assert any right as against the contracts which had been entered into by the government *de facto*; they must succeed in every respect to the property as they found it, and subject to all the conditions and liabilities to which it was subject under the contract.

Again, in the *Republic of Peru v. Dreyfus* (L. R. 38 Ch. D. 348), it was held that where a revolutionary or *de facto* government of a country had been recognized by a foreign State (*dd*), a subject of such foreign State might safely contract with that *de facto* government; and that if the previous government should be restored, then it was bound by International Law, if it claimed under such contract at all,

(*dd*) Recognized, that is, as a belligerent or as a *de facto* government, not necessarily as an independent State.

to adopt it subject to the rights of the foreign contractor ; in other words, that the restored government merely succeeded to such rights as the former *de facto* government had under it. It was also suggested that, even in the case of a contract by a foreigner with a rebel State that had not been internationally recognized, property acquired under such contract could not be recovered from the foreign contractor in derogation of the contract. In the case of the *Republic of Peru v. The Peruvian Guano Co.* (L. R. 36 Ch. 489), a statement of claim, which sought relief on the ground that a compromise of certain disputes, which had been come to between the defendants and the preceding *de facto* government, was not binding upon the plaintiffs (the succeeding government), was struck out, on the ground (*inter alia*) that the transactions of the *de facto* government which had been entered into by their duly authorized agents must be treated, by the tribunals of this country at least, as valid and effectually binding upon their successors.

STATE JURISDICTION.

THE QUEEN v. KEYN.

Temp. 1876.

[L. R. 2 Exch. Div. 63.]

Case.] The prisoner, Ferdinand Keyn, was indicted at the Central Criminal Court for the manslaughter of Jessie Dorcas Young. The deceased in February, 1876, was a passenger on board the British steamer "Strathclyde," on a voyage from London to Bombay. When off Dover the "Strathclyde" was run into by the "Franconia," a German vessel under the command of the prisoner, a German subject. The "Strathclyde" was sunk, and the deceased, together with several others of the passengers and crew, was drowned. It was alleged and found that the collision was due to the negligence of the prisoner as captain of the "Franconia." The point at which the collision occurred was $1\frac{1}{2}$ miles from Dover pier-head and within $2\frac{1}{4}$ miles from Dover beach. The "Franconia" having put into an English port, Keyn was indicted for manslaughter at the Central Criminal Court, and the facts

being such as amounted in English law to manslaughter, he was found guilty; but the question whether the Court had jurisdiction to try the case was reserved for determination by the Court for the Consideration of Crown Cases Reserved.

The legality of the conviction was contested on the ground that the accused was a foreigner commanding a foreign vessel on a voyage from one foreign port to another, that the offence was committed on the high seas, and that the accused was consequently not amenable to the jurisdiction of the English Courts. It appeared that criminal jurisdiction at Common Law was originally distributed between two tribunals. The Courts of Oyer and Terminer took cognizance of offences committed within the body of a county; the Court of the Lord High Admiral of those committed on the sea. Each Court claimed concurrent jurisdiction over offences committed on rivers or arms of the sea within the body of a county. By 15 Rich. II. c. 3, the Admiral's jurisdiction was limited to cases of death or mayhem "done in great ships being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh unto the sea"; this in addition, however, to his jurisdiction over "a thing done upon the sea." By 28 Hen. VIII. c. 15, all treasons, felonies, robberies, murders, and confederacies, committed in or upon the sea, or in any haven, creek, river or place where the Admiral had jurisdiction, were to be tried in such shires and places as might be limited in the king's commission, this to be directed for the same in like form and condition as for offences committed on land. The result of this statute was to transfer jurisdiction in such cases to the commissioners of Oyer and Terminer, amongst whom was included the Judge of the Admiralty Court, and to make such offences triable by the ordinary process. By 39 Geo. III. c. 37, the provisions of 28 Hen. VIII. c. 15, were extended to all offences committed on the high seas out of the body of any county. Ultimately by 4 & 5 Will. IV. c. 36, and by 7 & 8 Vict. c. 2, this jurisdiction was vested in the Central Criminal Court, and the Judges of Assize. In this manner offences

originally within the Admiral's jurisdiction became triable by the ordinary law of the land and before the ordinary Courts. This being so, the question in the present case was whether the jurisdiction originally vested in the Admiral, and now vested in the Central Criminal Court and the Judges of Assize, included jurisdiction over an offence committed by a foreigner on board a foreign vessel within three miles of the English shore.

Summary of Judgments.] On the argument of this question before the Court for the Consideration of Crown Cases Reserved, the majority of the Court (including Cockburn, C.J., Kelly, C.B., Bramwell, L.J., Lush and Field, JJ., Sir R. Phillimore and Pollock, B.), were of opinion that prior to 28 Hen. VIII. c. 15, the Admiral had no jurisdiction to try offences by foreigners on board foreign ships, whether within or without the limit of three miles from the shore of England, and that 28 Hen. VIII. c. 15, and subsequent statutes only transferred to other Courts such jurisdiction as had formerly been vested in the Admiral. Kelly, C.B., and Sir R. Phillimore came to the same conclusion also on the ground that at International Law the power of a nation over the sea within three miles of its coast existed only for certain limited purposes, namely, for the defence and security of the adjacent territory, and that Parliament could not consistently with those principles have intended to apply English criminal law within those limits.

The judgment of the majority was dissented from by Lord Coleridge, C.J., Brett and Amphlett, L.JJ., and Grove, Denman and Lindley, JJ., on the ground that the sea within three miles of the coast constituted part of the territory of England, that the English criminal law extended over those limits, and that the Admiral formerly had jurisdiction to try offences there committed, although on foreign ships. Coleridge, C.J., and Denman, J., also upheld the jurisdiction of the Court on the further ground that the prisoner's ship having run into a British ship and sunk it and so caused the deceased's death, the offence must be deemed to have been committed on board a British ship.

Judgment of Cockburn, L.C.J.] In his judgment the Lord Chief Justice laid down as a general rule that a subject of one country could not be made amenable to the criminal law of another country except for acts done within the limits of its territory or on board one of its vessels. If the legislature of a particular country thought fit by express enactment to render foreigners subject to its laws with reference to acts committed beyond its territory, it would be incumbent upon the Courts of such country to give effect to such enactment, leaving it to the State to settle the question of International Law with the Governments of other nations. But in default of such specific enactment the accused could not be made amenable to English law unless he was either within the limits of British territory or on board a British vessel.

As to whether there was any such express rule of English law, it appeared that at Common Law every offence was triable only in the county in which it was committed, the jurors having to be summoned from that county. Bays, gulfs, or estuaries were held to be within the body of the adjacent county; but along the rest of the coast Common Law jurisdiction only extended to low-water mark. Offences outside these limits were left to the Admiral, as exercising the authority of the Sovereign on the high seas; except that in respect of murder and mayhem committed in ships at the mouths of great rivers a concurrent jurisdiction was given by Statute. By subsequent statutes all criminal jurisdiction formerly belonging to the Court of the Admiral was transferred to Courts of Common Law, but these statutes gave the Courts no greater jurisdiction than the Admiralty originally possessed. After referring to the authorities the Lord Chief Justice held that the Admiral's jurisdiction was never exercised (except in case of piracy) over offences committed on other than British ships.

If, therefore, the accused was to be held amenable to English law, it must be either on the ground that the offence, having been committed within the three-mile limit, must be considered

to have been committed within the limits of British territory, over which the State had civil and criminal jurisdiction; or on the ground that it must be deemed to have been committed on board a British vessel by reason of the death of the deceased having taken place there.

With respect to the three-mile limit, the learned Lord Chief Justice said the doctrine in question amounted to this, that a belt of the sea to a distance of three miles from the coast, though so far a portion of the high seas as to be within the jurisdiction of the Admiral, was yet part of the territory of the realm so far as to make a foreigner within such belt, though on a foreign ship, subject to English law. Originally indeed sovereignty was claimed by the English Crown over the narrow seas, and a concurrent jurisdiction even beyond this. But such extravagant pretensions on the part of England and other nations had long since ceased, and in no way supported the doctrine of jurisdiction within the three-mile zone, since if it existed at all it would apply to the whole of the surrounding seas.

The Lord Chief Justice then went on to trace the origin and growth of the doctrine of the three-mile limit. After careful examination of the writings of the English, American and Continental publicists (e), he came to the conclusion that the suggestion of Bynkershoek that the sea surrounding the coast to the extent of cannon range should be regarded as belonging to the State, had been almost universally adopted by the subsequent writers on International Law; but he added that great difference of opinion existed as to the exact distance, and as to the still more essential question of the nature and degree of sovereignty. As to distance, the majority adopted the three-mile zone, others more consistently applied the principle on which the doctrine really rested, viz., the range of cannon shot. On the question of the nature of the sovereignty still greater divergence of opinion existed, some writers con-

(e) These should if possible be referred to, pp. 176 to 191 of the report.

tending for absolute dominion and a right of excluding foreign vessels even from passage; others contending for dominion, but subject to a *jus in re aliena* on the part of other nations to pass and repass; whilst others denied that there was any right of property, but conceded a more or less extensive jurisdiction. Even as to this jurisdiction, views differed; some limiting it to purposes of safety and police, others extending it to the enforcement of revenue and fishery laws, others distinguishing between a passing ship and a commorant ship in the matter of jurisdiction. None of these writers, however, went to the length of asserting the liability of a foreigner in a foreign ship to the criminal law of the local State. The effect of the general consensus as to some part of the sea being subject to jurisdiction for some purposes, was entirely negatived by the complete divergence of opinion as to the practical application of the principle.

As to the contention that the sea to the extent of three miles from the coast formed part of the realm of England, the learned Lord Chief Justice, after reviewing the authorities, held that the littoral sea beyond low-water mark did not originally form part of the territory of the realm. The statements of ancient authorities on this subject were manifestly based on the doctrine that the narrow seas were part of the realm of England, a doctrine which was long since exploded. This doctrine could not now be evoked for the purpose of applying it within a more limited sphere. If it failed at all, the whole doctrine failed.

If, as it appeared to him, the littoral sea beyond low-water mark did not originally form part of the territory of the realm, how and when did it become so? If it had become so in fact, this result must be ascribed to the writers on International Law. But even if these had been entirely unanimous on the subject, they could not make law apart from the assent of civilized nations. In addition to this, even if assent on the part of other nations was clearly proved, yet it was doubtful if such principles, amounting in fact to a new law, could be applied by a municipal court here, in default of an Act of Parliament.

The question being then not one of theoretical opinion but of fact, what evidence, either in the shape of treaties or usage, was there of such a principle? As regards treaties, the rule that the sea surrounding the coast was to be treated as adjacent territory in such a way as to give the State dominion, together with criminal and civil jurisdiction, over passing vessels of other nations, had never been made the subject matter of any treaty, or even the subject of diplomatic discussion. It had been entirely the creation of writers on International Law. The treaties referred to on the subject related to two matters only, namely the observance of the rights and obligations of neutrality, and the exclusive right of fishery. The distance of three miles had been adopted in those treaties not as matter of existing right, but as matter of mutual concession and convention. As to usages, the only usages found to exist were connected with navigation, revenue, fishery, or neutrality laws. There appeared to be no usage warranting the application of the general law to foreigners on the littoral sea. It was the first time that a Court of Justice had been called upon to apply the criminal law of the country to such a case as the present. It was quite possible, in view of the opinions of writers on public law, that if a nation chose by municipal law to subject foreigners within these limits to its jurisdiction, this would be acquiesced in by other nations; the principle would then be attributable to such acquiescence. If such a rule were adopted it would, without doubt, be binding on the municipal tribunals; but the power of Parliament to legislate could not be treated as making up for the want of actual legislation giving the Courts authority to apply such a rule of criminal law in such a case.

The learned Lord Chief Justice then proceeded to consider the statutes relating to the sea by which foreigners might be affected. Of these some had no reference to the three-mile zone, others had such reference. Dealing with statutory enactments relating to foreigners within

the three-mile zone, he found that these were confined to violation of neutral duties or breaches of the revenue or fishery laws, and that, apart from these, there had been no assertion of legislative authority in the general application of the penal law to foreigners within the three-mile zone. It further appeared that when asserting its power to legislate with reference to foreigners within the three-mile zone, Parliament had deemed it necessary to express such intention in specific terms. This surely was an indication that a Court of Justice could not apply such a rule without the authority of specific legislation. After reviewing the decisions which had been quoted in connection with the subject, he remarked that most of these seemed to have arisen on the construction of Acts of Parliament, but in none was the question raised, how far could local law, without an Act of Parliament, be made applicable to foreigners within the three-mile zone.

Taken together, decisions and dicta showed that the views and opinions of the foreign jurists as to a territorial sea had been received with favour by eminent judicial authorities of this country, and that the doctrine respecting it had been admitted in the construction of statutory enactments; but none of them established or even suggested that independently of statute the criminal law of England was applicable to the foreigner navigating any part of its shores. Having regard to all these facts, viz.:—that all pretensions to sovereignty in the narrow seas had been long since abandoned—that the statements made by the jurists were uncertain and indefinite both as to the extent of space and the nature of the sovereignty claimed over the littoral sea—that such penal jurisdiction had never been conceded by other nations or acquiesced in except for violation of neutrality or breach of revenue or fishery laws—that neither in its legislation as to shipping nor as to criminal jurisdiction had Parliament thought fit to assume sovereignty within the three-mile zone in respect to foreigners—that wherever a foreigner had been rendered amenable to English law this had been done by express and specific legislation—in

view of these facts and of the total absence of all precedent in favour of the contention, the learned Lord Chief Justice laid down that the Court would not be justified in holding the offence to be punishable by the law of England, especially as in so holding it must declare the whole body of the penal law to be applicable to foreigners passing our shores in foreign vessels on their way to foreign ports.

Another contention urged on behalf of the Crown was, that, the death having taken place on board a British ship, the offence must be deemed to have been committed within the jurisdiction of the British Courts. As to this the learned Lord Chief Justice expressed an opinion that, if the defendant had purposely run into the "Strathclyde," it might have been held that the killing of the deceased took place where the death occurred, and consequently that the act had been committed on board a British ship; but he added that where death arose from the running down of another ship through negligence, and where consequently the negligence might be said to be confined to the improper navigation of the ship occasioning the mischief, he did not see how the party guilty of such negligence could be said to be either actually or constructively in the ship on which the death took place.

He was, therefore, of opinion that there was no jurisdiction to try the defendant, and that the conviction was illegal and should be quashed (*f*).

The Queen v. Keyn, L. R. 2 Exch. Div. 63.

Extracts from the judgment of Cockburn, C.J., have been given at some length, not only as containing a clear exposition of some important principles of International Law, but also as illustrating very forcibly the attitude taken up by the English Courts towards principles laid down by the text writers, but not supported by treaty, statute, or decided cases.

The jurisdiction exercised by a State is either territorial or per-

(*f*) The judgment of Lindley, J., should be referred to for an exposition of the contrary view.

sonal. With the latter we are not at present concerned. So far as State jurisdiction is territorial, it extends over all things and persons (not having the privilege of extritoriality) found within the State territory. This, for the purposes of International Law, comprises the whole area of land and water within its boundaries; these being ascertained by prescription, occupation, treaty, and accretion. It also includes narrow straits and bays, islets adjoining the coast, and has been generally accepted as including the marginal or littoral sea within three miles from low water-mark.

In the *General Screw Collier Co. v. Schurmans* (29 L. J. Ch. 877), an English vessel that had run down a foreign vessel within three miles of the English coast, was held to be entitled to the benefit of the limitation of liability prescribed by the English Merchant Shipping Act, on the ground that the British jurisdiction for this purpose must be held to extend to three miles from the coast. But in *Reg. v. Keyn*, it was held by the majority of the Court that this jurisdiction did not extend to the enforcement of the criminal law of England as against foreigners passing our shores in foreign vessels on their way to foreign ports. This defect has now within certain limits been remedied, so far as our municipal law is concerned, by the Territorial Waters Jurisdiction Act, 41 & 42 Vict. c. 78. By this Act it is enacted that an offence committed by any person within territorial waters shall be an offence within the Admiral's jurisdiction, although committed on a foreign ship. But proceedings under the Act against a foreigner, other than preliminary proceedings before a justice of the peace, are not to be instituted in the United Kingdom, except with the consent of a Secretary of State, and on his certificate that the institution of proceedings is expedient; or in the colonies except with the consent of the Governor, and on a similar certificate. The Act is not to affect jurisdiction by the Law of Nations, or any jurisdiction conferred by statute or existing in relation to foreign ships or persons on board them, nor is it to affect the trial of piracy. The term "territorial waters" is defined as such part of the sea adjacent to the United Kingdom or other part of the British dominions, as is deemed by International Law within the territorial jurisdiction; and for the purposes of the Act, any part of the open sea within one league from the coast, measured from low-water mark.

Whatever doubts may exist with regard to the exercise of a criminal jurisdiction within these limits (*ff*), there can be no doubt that the usage of nations clearly warrants the exercise of such jurisdiction as may be necessary for the purposes of defence and security, and this extends to the enforcement of local revenue laws and rules

(*ff*) This subject is treated of further in connection with the jurisdiction exercised over private vessels, see p. 72, *infra*.

of navigation. Both Great Britain and the United States of America, however, appear to have exceeded this limit in prohibiting transshipment of foreign goods within four leagues from the coast (*g*). By the Customs Law Consolidation Act, 1876 (*gg*), s. 53, if bulk is broken, or the storage of any goods altered within four leagues of the coast, so as to facilitate the unloading of the cargo before the report of the ship, the master is rendered liable to a penalty of 100*l*.

**THE DIRECT UNITED STATES CABLE CO., LIMITED
v. THE ANGLO-AMERICAN TELEGRAPH CO.,
LIMITED.**

Temp. 1877.

[*L. R.* 2 App. Cas. 394.]

Case.] This was an appeal from an order of the Supreme Court of Newfoundland, whereby the Direct Co. (the appellants) were put under an injunction prohibiting them from infringing certain exclusive rights granted to the Anglo-American Co. (the respondents), or their predecessors in title under an Act of the Newfoundland Legislature. It appeared that the appellants had brought and laid a telegraph cable to a buoy, lying within Conception Bay on the east coast of Newfoundland. The buoy was laid more than 3 miles from the shore of the Bay, but at the same time more than 30 miles within the Bay. The Bay is well marked, the distance between the two promontories at its entrance being rather more than 20 miles; the distance between its head and these promontories being respectively 40 and 50 miles; and its average width being about 15 miles. In laying the cable care had been taken not to come, at any point, within 3 miles of the shore, and so no question arose similar to that in the case of the *Franconia*, as to State jurisdiction over the ocean within the 3 mile limit. The question in the case was as to the territorial dominion over a bay of the configurations and dimensions above described. If, according to the true construction of the local Act it was the intention of the Newfoundland Legislature to prohibit the use of "any part

(*g*) Phillimore II., p. 275.

(*gg*) See 39 & 40 Vict. c. 36.

of its territory" by any other persons than the respondents for the purposes of telegraphic communication, and if the Newfoundland Legislature had been duly invested with such rights of legislation by the Imperial Parliament, then the respondents were entitled to a continuance of the injunction, subject only to the Bay being part of such territory.

Judgment.] The judgment of the Privy Council was delivered by Lord Blackburn. It was held that on the true construction of the Act in question, it was the intention of the Newfoundland Legislature to prohibit the use of "any part of the territory" by any other persons than the respondents for the purposes of telegraphic communication, whether within the island or as a means of transit between places outside its territory. It was further held that by 35 & 36 Vict. c. 45, the Imperial Parliament had conferred upon the Legislature of Newfoundland, the right to legislate with regard to it. The only question, therefore, that remained was whether the Bay could be regarded as part of the local territory.

The English common law authority on this subject was slender and vague. Lord Coke and Lord Hale had both recognised the principle that branches of the sea "might" be regarded as within the body of the adjoining county, "where a man may reasonably discern" between shores. But this test was very indefinite; nor had the doctrine been applied to any particular place. In one case, however, *Reg. v. Cunningham* (Bell, Cr. c. 86), it had become necessary to determine whether a particular spot in the British Channel, on which three foreigners on board a foreign ship had committed a crime, was within the county of Glamorgan, the indictment having charged the offence as having been committed within that county. In that case the Court for the Consideration of Crown Cases Reserved, after full discussion, had proceeded on the principle that the whole of that inland sea between the counties of Glamorgan and Somerset, was to be considered as within the counties by the shores of which its several parts were respectively bounded. The case also showed that usage, and the

manner in which a branch of the sea had been treated in practice, were material in determining whether it was to be regarded as part of the adjoining territory or not.

Passing from the Common Law to the Law of Nations, Lord Blackburn observed that there was a universal agreement that harbours, estuaries, and land-locked bays belonged to the territory of the nation possessing the shores around them ; but no agreement had been come to as to what constituted a "bay" for this purpose. Some writers suggested defensibility from the shore as the best ; some suggested a width of one cannon shot from shore to shore, or three miles ; some a cannon shot from each shore, or six miles ; some an arbitrary distance of 10 miles. All these tests would exclude Conception Bay from the territory of Newfoundland ; but equally would they have excluded from the territory of Great Britain that part of the Bristol Channel which in *Reg. v. Cunningham* was held by an English Court to be part of the county of Glamorgan. The text-writers did not, therefore, appear to agree ; and the general question as to what configuration was necessary in order to constitute a bay a part of the adjoining territory did not appear ever to have been the subject of any judicial determination.

In the present case, however, it was not necessary to lay down any general rule, inasmuch as, in point of fact, it appeared that the British Government had, in point of fact, long exercised dominion over this bay, and that the British claim had been acquiesced in by other nations, so as to show that the Bay had for a long time been exclusively occupied by Great Britain. After referring to illustrations of this exercise of dominion and acquiescence, it was held that in the view of a British tribunal this was conclusive to show that the Bay had become by prescription part of the exclusive territory of Great Britain. It was therefore recommended that the appeal should be dismissed.

The Direct United States Cable Co., Limited v. The Anglo-American Telegraph Co., Limited, L. R. 2 App. Ca. 394.

It will be observed that the Privy Council in this case refused to decide the general question, as to what constitutes a bay or branch of the sea part of the territory of the State adjoining. The case does decide, however, that prescription and usage will be material in determining this, and this is probably not merely a statement of municipal rule, but also in accordance with the usage of nations.

Looking at the practice of nations, it would seem bays and gulfs, even of considerable size, are, when they run into territory of a single State, very commonly treated as part of the territorial waters of that State, presumably on the same grounds of user and acquiescence as guided the Privy Council in the leading case. Thus the United States of America would probably regard Chesapeake Bay and Delaware Bay as subject to their jurisdiction (*h*); whilst Holland claims jurisdiction over the Zuyder Zee.

So far as the exercise of exclusive rights of fishery go, this jurisdiction is sometimes limited by treaty to gulfs and bays, which do not exceed ten miles at their opening, measured by a straight line drawn from headland to headland. But in default of treaty this limit commonly is not observed. Thus France claims the whole of the oyster beds of the Bay of Cancale, the mouth of which is seventeen miles in width, and all rights of fishery are strictly reserved as against foreign fishermen (*i*).

Straits are also, in strictness, subject to the territorial jurisdiction of the State to which the land on either side belongs, but owing to the greater necessity for their use on the part of other nations, and especially where they constitute a maritime highway, this jurisdiction is generally recognized as subject to a right of innocent passage on the part of ships belonging to other nations. This has perhaps no ground in principle, although it has in convenience. Most of the important straits, moreover, as to which any dispute would be likely to occur, have now been opened up by treaty (*j*).

(*h*) See the case of the *Grange*, p. 231, *infra*.

(*i*) See Hall, p. 154, *in notis*.

(*j*) See Hall, pp. 153 to 157, and Wheaton, by Lawrence, p. 328.

REX v. MANOEL ANTONIO DE MATTOS.*Temp. 1836.*

[7 C. & P. 458.]

Case.] The accused, who was a Spanish subject, had whilst in England, signed articles to serve on an English ship. On the ship's arriving at Zanzibar, the master resigned his position and, apparently with the consent of the new master, employed the accused to act as interpreter for him on shore, in the business in which he had engaged. On the return of the ship to Zanzibar, after several short intermediate voyages, a quarrel arose on shore between a member of the crew and the accused, in which the former was so injured by the latter, that he died after regaining the ship. The accused was then brought to England, indicted for the murder, and tried under a special commission issued under 9 Geo. IV. c. 31, s. 7. This statute had enacted that any "British subject" might be indicted and tried in England for murder or manslaughter, or being accessory before the fact to murder, or after the fact to murder or manslaughter, committed on land out of the United Kingdom, whether within British dominions or without. It was contended at the trial, that, although the prisoner was not in the ordinary sense a subject, yet as he had signed articles on board a British ship, which had not then expired, and had so become entitled to the benefits of certain Acts of Parliament, he was in fact a British subject.

Judgment.] Vaughan, J., after observing that there were other ways in which a man might be constituted a British subject than by the mere fact of birth, as, for instance, by owing allegiance in return for protection given him, pointed out that though the accused had been under British protection for a time, yet he had abandoned this and had been living on shore for several months. Bosanquet, J., also doubted whether, under the circumstances, the offence could be said to have been committed on land out of the United Kingdom as

required by the Statute. In the result both the learned judges stated it to be their opinion that there could not be a conviction.

Rex v. De Mattos, 7 C. & P. 458.

This case is cited as illustrative of the personal jurisdiction, which is sometimes claimed by States over their subjects and persons in allegiance to them.

As has been already pointed out, the jurisdiction exercised by a State is either territorial or personal. Its territorial jurisdiction extends over all persons and things within its territory and within what is reckoned as its territory, saving only those that enjoy the privilege of extraterritoriality (*k*). With territorial jurisdiction, also, we may class the analogous jurisdiction which a State exercises over its public vessels everywhere, and over its private vessels on the high seas, the limits of which will be treated of later (*l*). Personal jurisdiction, on the other hand, is independent of place, and rests on the national character of the persons over whom it is exercised.

Some States, such as Russia, Norway, Portugal, and Germany, claim a criminal jurisdiction over all offences committed by their subjects anywhere, even whilst in foreign countries, whether such offences are committed against the State itself, its subjects, or foreigners (*m*). In France, it has been laid down that French criminal law is for Frenchmen a personal statute, which binds them in foreign countries, and consequently that when a Frenchman has committed a crime in a foreign country, he can be prosecuted for it when he returns to France. Even if he commits a "*délit*" whilst abroad, he can be proceeded against on his return, subject to the act in question having been also a punishable offence under the foreign law. But in practice it seems that the French courts will not generally punish crimes committed by Frenchmen against foreigners on foreign soil, or even crimes committed by Frenchmen against Frenchmen except on the complaint of the injured party; but they will punish offences committed by anyone against the French Government or against the safety of France, including the counterfeiting of its seals, coins, and paper money (*n*). Italy punishes high crimes of its subjects committed abroad, but treats lesser offences by the rule of reciprocity.

According to the doctrine of Great Britain and the United States, criminal jurisdiction is strictly territorial. By the Common

(*k*) See p. 28, *supra*.

(*l*) See pp. 55 and 72, *infra*.

(*m*) See Forsyth, p. 233.

(*n*) See Wheaton by Dana, s. 120.

Law, a British court of justice has strictly no jurisdiction to try a crime committed abroad, whether by a British subject or a foreigner (*o*). To this rule, however, many exceptions have now been set up. (1.) Even by the Common Law, there is jurisdiction to punish piracy by the Law of Nations, committed on the open sea by any person whatever, whether a British subject or not (*p*); (2.) The criminal law of England, moreover, extends to high treason and misprision of treason committed outside British territory by any British subject, although this is perhaps no real exception, inasmuch as the seat of the offence is locally British (*q*); (3.) It also extends to the offences of murder and manslaughter, and being accessory thereto, when any such offence is committed by a British subject on land out of the United Kingdom, whether within the British dominions or not, and whether the person killed be a British subject or not (*r*); (4.) It also extends to all crimes, misdemeanours, and offences committed in India by any European subject of the Crown, whether against other European subjects or the natives of India (*s*); (5.) It also extends to every crime, misdemeanour, or offence committed by any person employed by or in the service of the Crown, in any civil or military station, office, or capacity, out of Great Britain, in the exercise or under colour of such station, office, or capacity (*t*); (6.) It also extends to cases of oppression or crimes committed by colonial governors and persons employed in like capacity, within the dominions of the Crown beyond the seas (*u*); (7.) Also to the offence of inciting British troops to mutiny, wherever such troops may be serving (*x*); (8.) Also to offences within the Foreign Enlistment Act, 1870, s. 4, wherever committed, and to offences within other sections of the Act, if committed within any part of the British dominions, or adjacent territorial waters (*y*); (9.) Also to offences under the Slave Trading Act of 1824, s. 10, if committed by subjects of the Crown, or by any person resident within British dominions (*z*); (10.) Finally it also extends to the offence of bigamy committed by British subjects anywhere (*a*).

The question of personal jurisdiction in civil cases scarcely belongs to our subject—but it is perhaps worth while to point out that under the English law, until the passing of the Common Law Procedure Act, 1852, no provision was made for the service of any writ or process outside the jurisdiction. The cases in which this is now

(*o*) See Forsyth, p. 233.

(*p*) See p. 129, *infra*.

(*q*) See 35 Hen. VIII. c. 2.

(*r*) See 24 & 25 Vict. c. 109, s. 9.

(*s*) See 13 Geo. III. c. 63, s. 39.

(*t*) See 42 Geo. III. c. 85, s. 1.

(*u*) See 11 & 12 Will. III. c. 12.

(*x*) See 37 Geo. III. c. 70.

(*y*) See 33 & 34 Vict. c. 90 and p. 256, *infra*.

(*z*) See 5 Geo. IV. c. 113; see also s. 9 of the Act, and p. 125, *infra*.

(*a*) See 24 & 25 Vict. c. 100, s. 57, and see generally Stephen's Digest of Criminal Procedure, pp. 3, 4, and 5.

allowed are set forth in Order XI., Rule 1, of the rules framed under the Judicature Acts, 1873 and 1875 (*aa*), but though the process in such cases is extra-territorial, yet the jurisdiction, in each of the cases specified, is founded on some legal fact or act within the jurisdiction.

It should be observed that, just as exterritoriality, on the one hand, limits the exercise of the territorial jurisdiction of a State within its own territory, so on the other, it has the effect of extending its jurisdiction extra-territorially in regard to certain persons and property of the State outside its limits. Thus the extra-territoriality clauses in treaties made between Great Britain and certain Eastern countries, such as Turkey, China, and Japan, have the effect of extending the application of British law to British subjects beyond the limits of British territory (*b*). This is a partial revival of the system of personal laws that obtained in Europe after the break-up of the Roman Empire (*c*).

EXTRADITION.

IN RE CASTIONI.

Temp. 1890.

[L. R. 1891, 1 Q. B. D. 149.]

Case.] Angelo Castioni, a Swiss subject, had been arrested in England at the requisition of the Swiss Government, on a charge of murder. Castioni having been committed to prison by the English magistrate, with a view to his extradition, the present application was made for an order calling on the magistrate, the solicitor to the Treasury, and the consul-general of Switzerland to show cause why a writ of Habeas Corpus should not issue to bring up the body of Castioni with a view to his discharge from custody. The facts were shortly as follows:—In September, 1890, a political disturbance took place in the Canton of Ticino in Switzerland, in consequence of

(*aa*) 36 & 37 Vict. c. 66 and 38 & 39 Vict. c. 77.

(*b*) See the Foreign Jurisdiction Acts,

and see also p. 120, *infra*, as to system of consular jurisdiction in these countries.

(*c*) See Holland, p. 350.

the administrative abuses alleged to exist there, and the refusal of the Government to submit a revision of the constitution of the Canton, with a view to the remedying of these abuses, to the popular vote. A number of the citizens of Bellinzona, amongst whom was the prisoner, thereupon seized the arsenal of the town, and having in this way provided themselves with arms, they overthrew the police and putting some of their prisoners in their van, marched to the municipal palace, demanding admittance. This having been refused by certain members of the Government, the crowd broke into the building, and in the scuffle that ensued a municipal councillor called Rossi was shot at and killed, the prisoner being identified as the person who fired the shot. It did not appear that the prisoner had any previous knowledge of Rossi, or that the act was in any way one of private malice, but at the same time, the killing of Rossi was not necessary to the success of the insurrection. A provisional government was formed by the insurgents, but this was soon after suppressed by the Federal troops. The main issue in the case was whether the offence was one of a political character, for the commission of which the prisoner would not be liable to extradition, under the provisions of the Extradition Act, 1870 (d).

Judgment.] The Divisional Court, comprising three judges, held unanimously that crimes, otherwise extraditable, became political offences "when incidental to and forming part of political disturbances." Proceeding to apply this principle to the evidence in the case, the Court expressed the opinion that, although the killing of Rossi might have been a cruel and wanton act, and one unnecessary to the purposes of the insurgents, yet, as the prisoner had no private spite against Rossi, whom he did not even know, and as the act appeared to have been done in furtherance of the rising, the habeas corpus ought to go, and prisoner ought to be set at liberty. At the same time Hawkins, J., observed, that he entirely dissented

(d) Section 3, 1, of the Act provides that "a fugitive criminal shall not be surrendered if the offence in respect of

which his surrender is demanded is one of a political character."

from the proposition, that any act done in the course of a political rising was necessarily of a political character. Notwithstanding that a man might join in a purely political rising, yet if he deliberately, and as a matter of private revenge, and for the purpose of doing injury to another, shot an unoffending man, no one could question that he would be guilty of the crime of murder; in such a case the offence so committed could not be said to have any relation at all to a political crime.

In re Castioni, L. R. 1891, 1 Q. B. D. 149.

Some offences, such as treason, political conspiracy, and seditious libel, are manifestly of a political character. But, in this case, the English courts had to determine under what circumstances an offence otherwise extraditable, such as murder, became a political offence, and consequently exempt from extradition. For this purpose it was held that it must form part of or be incidental to a political disturbance; that it must be done in the belief that it promoted the political end in view; that the act must not be one of private malice merely, done under the guise of or in the course of political action; but that, subject to this, it would not be essential to show that the act was necessary, or that it was in fact calculated to promote the objects of the rising; that on the contrary, the act might have been wanton and unnecessary, and yet if prompted by a genuine political motive, and incidental to a political rising, it would fall within the exception of political offences. The definition followed by the Court, is that suggested by Sir J. F. Stephen in his *History of the Criminal Law* (*dd*).

To turn now to the question of Extradition in general, it is clear that crimes committed in foreign States by foreign subjects, are not within the criminal jurisdiction, even of those States that adopt the broadest views of their powers in this respect. The only question in such cases as these, therefore, will be, how far is a State in which the offender takes refuge, bound to aid the criminal law of the State in which the offence was committed, by arresting and surrendering the offender.

On this subject there is a great divergence between the views of different publicists. Some, including Grotius, Vattel, and Kent, put forward the view that a State is bound to surrender a person charged or convicted of crime in another State, on the demand of the latter. Others, including Puffendorf and Heffter, contend

(*dd*) See *History of Criminal Law*, Vol. II., p. 71.

that there is no such international obligation, that the matter is merely one of comity and convenience, and requires to be regulated by treaty and compact.

The practice of nations has been equally divergent. "No two nations," says Sir J. F. Stephen, "follow the same practice, and it has in fact been found necessary to provide in each case special laws relating to the subject." The present doctrine of the United States appears to be that extradition will only be made under treaty and only in such cases and upon such terms as are specified in the treaty (*e*). The French view appears to be that there is an inherent obligation to surrender, and that where treaties are entered into, they serve to regulate the method of exercise, but do not create the obligation (*f*). A circular of the French Minister of Justice, issued in 1841, stated that most civilized countries, except Great Britain and the United States, would surrender criminals, without treaty. With respect to Great Britain there is some evidence to the effect that in earlier times the doctrine prevailed that there was an inherent obligation to surrender, apart from treaty (*g*). But this view, if it ever did prevail, has now been superseded, and the principle adopted that there is no obligation to surrender except under treaty (*h*). The Executive has power to make such treaties, but effect can only be given to them under Act of Parliament. The present British extradition arrangements are based on the Extradition Act of 1870, the Amending Act of 1878 (*hh*), and on the various treaties thereunder that have now been entered into with most civilized nations (*i*). The Extradition Acts in substance provide as follows:—(1.) That the Crown by Order in Council shall have power to apply the provisions of the Act to such extradition treaties as may be entered into with other States; (2.) That any such Order in Council applying the Act shall be laid before Parliament within six weeks of its being made or of the next meeting of Parliament, the Order then being conclusive evidence that the arrangement made is in compliance with the terms of the Act; (3.) That in virtue of such arrangements, any person charged with or convicted of crimes in the foreign country with whom the treaty is made, may be arrested and surrendered to the authorities of that country upon such evidence as would have justified a committal for trial upon a similar charge in England; (4.) With regard to the offences which may be made the subject of extradition under such arrangements, the general result of the Acts is to admit of almost any offence, except those hereafter

(*e*) See Opin. U. S. A. G. XIV. 238.

(*f*) See Wheaton, by Lawrence, p. 184.

(*g*) See *Mure v. Kay*, 4 Taunt. 34; and *East India Co. v. Campbell*, 1 Ves. 240.

(*h*) See *Reg. v. Bernard*, Ann. Reg. 1858, p. 328.

(*hh*) See 33 & 34 Vict. c. 52, and 36 & 37 Vict. c. 60.

(*i*) See p. 41, *infra*.

mentioned, being made extraditable; but in practice extradition provisions are usually confined to offences of a grave character (*k*). The limitations on extradition are as follows:—(1.) No person is to be surrendered for political offences, or where he can show that the requisition for his surrender is made with the view of trying or punishing him for a political offence. Some offences are, from their very nature, on this ground, excluded from extradition treaties; such would be high treason, riots for political purposes, seditious libels, and conspiracies. Other offences, which are *prima facie* extraditable, are now exempt from extradition, if they are “incidental to or form part of political disturbances,” in accordance with the decision in the leading case. (2.) No fugitive criminal, who when his surrender is requested, is accused of or is undergoing punishment for an offence committed within the British jurisdiction, is to be surrendered until he has been discharged or has undergone his punishment. (3.) Finally no person is to be surrendered unless provision is made by the law of the State demanding his surrender, or by arrangement, that he shall not be tried for any offence committed prior to his surrender, other than the crime proved by the facts on which the surrender took place, unless he has previously had an opportunity of returning to the country which surrendered him (*l*). In *Lawrence's Case* (*m*) the prisoner was in 1875 surrendered by Great Britain to the United States on a charge of forgery; it was subsequently apprehended by Great Britain that he would be tried on a charge of conspiracy and smuggling, in violation, as it appeared, of the conditions of the surrender; in reply to the British remonstrance, the United States contended that they were in no way bound by the provisions of the English Act. In consequence of this any further surrender of criminals to the United States was suspended by Great Britain, until it was intimated by the United States government that Lawrence would not be tried for any other offence than that for which he had been surrendered; at the same time no agreement with respect to the future was arrived at between the two governments. In *Rauscher's Case*, which occurred in 1886, the prisoner was surrendered by Great Britain to the United States on a charge of murder; he was subsequently proceeded against on the same evidence, but on another charge, viz., that of having inflicted cruel and unusual punishment on one of the crew of a ship of which he was master, this not being an offence provided for in the treaty under which he was surrendered. On motion being made in arrest of judgment, the Supreme Court held that the extradition treaty with Great Britain was part of the law of

(*k*) See Stephen's Hist. Crim. Law, II., p. 69.

(*l*) For a criticism of this limitation on Extradition, see Stephen's Hist. of

the Criminal Law, p. 71.

(*m*) See Parl. Papers 1876, Accounts and Papers, Vol. 82.

the land, of which the Court was bound to take judicial notice ; that one country receiving an offender against its laws from another country had no right to proceed against him for any other offence than that for which he was surrendered ; that by the law of the United States the prisoner, therefore, could not be tried for any other offence unless he had a reasonable time given him to leave the country before being arrested for such other offence ; that the mere fact of the evidence being the same did not make any difference ; and that the prisoner was, therefore, exempt from the prosecution in question. Waite, C.J., however, dissented on the ground that such a contention could not be put forward by the prisoner, but must be urged diplomatically by the country that made the surrender. Having regard to the decision of the majority of the Court, it seems that the views of Great Britain and the United States on this subject have now been brought into harmony, without the necessity of diplomatic arrangement. The French Courts have also laid it down as a principle of International Law, that a prisoner who has been extradited cannot be tried for any offences except those specified in the demand for the surrender (n).

The principal Extradition Treaties that have been entered into by Great Britain are those with the United States, 1842, supplemented by a Convention of 1886 ; with Brazil, 1872 ; with Austria 1873 ; with Italy, 1873 and 1875 ; with Sweden, 1873 ; with Denmark, 1862 and 1873 ; with Germany, 1874 ; with Netherlands, 1874 ; with Switzerland, 1874, 1878, 1879, and 1880 ; with Belgium, 1872 and 1876 ; with France, 1876 ; with Spain, 1878 ; and with Portugal, 1879. There appears to be no treaty with Russia, Greece, or Turkey, or with some of the South American States.

Among the more important crimes that are made extradition-offences under the Treaty between Great Britain and the United States are, murder, piracy (by municipal law), arson, robbery, forgery, and the utterance of forged paper ; whilst the Convention of 1886 adds manslaughter, burglary, embezzlement, malicious injury by which life is endangered, and larceny of property of the value of £10 or \$50.

The ordinary procedure under the British Extradition Acts is shortly as follows :—A requisition for surrender must be made by the diplomatic representative or consul-general of the country requesting the surrender, whereupon the Secretary of State issues an order to one of the Bow Street police magistrates requiring him to issue his warrant for the apprehension of the fugitive criminal. This warrant is to be issued upon receipt of the order and upon such evidence as would justify arrest if the crime had been committed in England ; it may be executed in any part of the United

(n) See Dalloz, p. 502.

Kingdom; if the criminal is apprehended the case is then heard before the magistrate, and if the prisoner is committed under the Act, this fact has to be reported to the Secretary of State, the criminal having fifteen days within which to apply for a writ of *habeas corpus*, of which fact he must be duly informed. After this, the Secretary of State may issue his warrant for the surrender. If not surrendered within two months the prisoner is entitled to be discharged (o).

The delivery up of military and naval deserters is entirely dependent upon comity or upon treaties subsisting between the nations concerned. By 15 Vict. c. 26, power is given to the Queen to declare by Order in Council that deserters from foreign ships may be apprehended and given up, and upon the publication of any such Order justices are to aid in recovering deserters from ships of foreign powers, and may apprehend them and send them on board; persons harbouring deserters from foreign ships are also rendered liable to a penalty.

EXCURSUS I.—RIVERS AND INTEROCEANIC CANALS.

APART from Treaty and Convention the general principles governing the ownership and use of navigable rivers seem to be as follows:—(1.) Where a navigable river lies wholly within the territory of one State, dominion and user belong exclusively to that State. (2.) Where a river constitutes the boundary between two States, the frontier line is the middle of the channel or thalweg; but there is a presumption that both States have a right of user or navigation (p). Lord Stowell in his judgment in the “*Twee Gebroeder*” (q), puts the matter thus:—“In rivers flowing through conterminous States, a common use of the different States is generally presumed; there may exist a peculiar property, excluding the common use, but the general presumption is strongly against such an exclusive right, and such a claim if made must be established by clear and competent evidence; the usual manner of establishing such a claim is either by the express acknowledgment on the part of the conterminous State, or by an ancient exercise of executive jurisdiction, founded presumptively on an admission of prior settlement or subsequent cession, or in certain cases by the decision of some common superior as to their respective rights over the contested river.” (3.) Where a navigable river passes through or drains the territory of several States, it is commonly laid down that, although each State retains its sovereignty and dominion over such portion as

(o) For variations in this procedure, see Stephen's *Criminal Procedure*, pp. 100—103.

(p) See Heffter, § 77.

(q) See p. 236, *infra*.

lies within its territory, yet there exists an imperfect right on the part of the inhabitants of the upper banks, and probably on the part of all riparian owners, to the free navigation of the river. The existence of such a right, however, is frequently denied; at the most it cannot be considered more than a right of comity, though it gains in strength where the river affords the only means of access to the sea.

But though, "*stricto jure*," each State could thus appropriate and regulate waters wholly within its territory, the use and navigation of most of the more important navigable rivers that traverse the territory of different States, have now come to be generally regulated by Treaty or Convention. So far as European rivers go, it was provided as early as 1814 and 1815 by the Treaties of Paris and Vienna:—(1) that the navigation of rivers bordering on or passing through several States, should be free to their mouths; (2) that subject to this freedom of navigation, States might exercise rights of sovereignty over rivers traversing their territories, but storehouses and stations for trans-shipment were not to be established, nor were those already in existence to be preserved, except so far as they were of use for navigation or commerce; (3) that navigation dues should be independent of the quality and nature of the goods transported, and should not exceed the maximum fixed in June, 1815; (4) that the police regulations relating to navigation should be uniform, and should not be changed by one State without the consent of others.

THE RIVER RHINE.

In 1826 a dispute as to the navigation of the Rhine arose between Germany and Holland. In the Treaty of Paris, 1814, provisions had been inserted for securing the free navigation of the river to upper riparian States. These provisions were confirmed by the Congress of Vienna, 1815. In spite of this the Dutch Government, at a later time, claimed the right of imposing duties on vessels navigating the lower parts of the river. It appeared that above Nimeguen the river divided into three branches—the Waal, the Leck and the Yssel, all these being navigable. The Dutch Government contended that these were artificial mouths, that the real Rhine was a small stream leaving the Leck at Wyck, and that it was only this part of the river that the Powers were entitled to use under the provisions of the Congress of Vienna. The matter was at first compromised, the Dutch Government conceding the right of navigation in regard to the Leck. The Dutch Government afterwards consented to the substitution of the Waal for the Leck, this former being better adapted for navigation.

Subsequently a new contention was put forward by Holland, to the effect that the Waal terminated at Gorcum, and that the stream below that point, including the mouth of the Meuse, was a mouth of the sea enclosed within Dutch territory, and subject, therefore, to any imposts and regulations that the Dutch might establish. In this view Holland was supported by France and Baden alone. It was in reply pointed out that by the Treaty additional territory had been granted to Holland, and that this grant had been combined with the establishment of the freedom of the navigation of the river to the sea; that the right of navigation drew with it by implication the right to use the different waters connecting it with the sea; and that the right set up by Holland to levy unlimited tolls on the chief passage into the sea, rendered useless the right of navigation through Dutch territory.

The matter was ultimately settled by the Convention of Mayence of the 31st of March, 1831, between all the riparian States of the Rhine. Thereby the navigation of the river was declared free from the point at which it became navigable to the sea (*bis in die See*), and Holland undertook to indicate other watercourses for the navigation of the riparian States equal in convenience to those open to its own subjects, in case the passage by Briel and Helvoetaluys became unnavigable through natural or artificial causes.

By a provision of the Treaty of 1815, which is still in force, it was provided that, in case of war, the collection of customs on the Rhine should continue uninterrupted, without any obstacle being thrown in the way by either belligerent.

THE DANUBE.

By the Treaty of Paris of the 30th of March 1856, it was agreed that principles somewhat similar to those described above should be applied to the navigation of the Danube, and should be taken for the future to be part of the public law of Europe. The navigation of the river was to be subject to no impost not expressly provided for by the Treaty; the rules of police and quarantine were to favour navigation as much as possible; arrangements were made for the appointment of a European Commission for the purpose of clearing the river from all obstacles and improving the navigation of the lower part of the river and the adjoining sea, permission being given to levy tolls for the purpose of meeting the expenses of the works. Another Commission was appointed for the purpose of drawing up rules for the navigation of the river, and of making provision for the establishment of a river police. This Commission was further empowered to make arrangements for the removal of existing tolls, to execute all necessary works required in relation to the river, and, after the dissolution of the

European Commission, to maintain the navigation of the mouths of the river and the adjoining sea. Each of the parties to the treaty was to be at liberty to station two small boats at the mouth of the river, in order to see that the regulations were carried into effect. By Treaty of the 13th of March 1871, provision was made for securing the neutrality of the river works, but it was at the same time stipulated that Turkey should have the right to send ships of war up the river. From this it would seem that the navigation of the Danube, unlike that of the Rhine, is still liable to be impeded by belligerent operations.

DISPUTE AS TO THE MISSISSIPPI.

In 1763, by the Treaty of Paris between Great Britain, France, and Spain, the right of navigating the Mississippi was secured to Great Britain. Shortly afterwards Louisiana was ceded by France to Spain, and in 1783 Florida was retroceded to the latter country by Great Britain. Spain, having thus acquired the territory on either side, at the mouth of the river, subsequently claimed an exclusive right of navigation as from the southern boundary of the United States, which had meanwhile separated from Great Britain. This claim was resisted by the United States Government, on the ground that access to the ocean was free to all men, that rivers were free to all riparian inhabitants, and that the writers on the Law of Nations agreed that the innocent passage of a river was the natural right of all the inhabitants of the upper banks. The dispute was terminated by the Treaty of San Lorenzo el Real of 1795, whereby Spain agreed that the navigation of the river in its whole breadth and its whole length, from its source to the ocean, should be free to the citizens of the United States. Subsequently Florida and Louisiana passed into the hands of the United States, who thus acquired control over the whole river.

DISPUTE AS TO THE ST. LAWRENCE.

In 1826 a controversy arose between Great Britain and the United States on the subject of the navigation of the St. Lawrence River. The United States claimed the full and free navigation of the lower part of the river as a natural right. It was urged on behalf of the United States that by the Treaty of 1794 the United States were allowed to import goods through Canada, subject to similar duties to those payable by British subjects; that the right of the United States to navigate the river had been recognized by the statutes 3 Geo. IV. c. 44 and 3 Geo. IV. c. 119; and lastly that the naviga-

tion of the river had been opened up to the United States at the same time as to Great Britain. It was further contended, upon the authority of Vattel and Grotius, that the right of passage was a natural right, and recognized as such by the Law of Nations.

Great Britain replied that the claim by one State to navigate the territorial waters of another State could only rest on convention. The authority of Puffendorf was opposed to such demands, on the ground that if a nation permitted them it would be overflowed with foreigners, and that a nation was justified in reserving to its subjects the profits that would go to foreigners if free navigation was allowed. It was also urged that no treaties had recognized a natural and independent right to navigate rivers; that the provisions of the Treaty of Vienna tended to show that there was no such right, and that a right to free navigation could only be established by convention; that even if the United States had acquired the right to navigate the river in question at the same time as Great Britain, that right had been taken away by the Treaty of American Independence; and finally that the third article of the Treaty of Commerce between the two countries showed that Great Britain had the power of excluding foreign vessels from that part of the river which was entirely within British dominion.

The dispute was terminated by the Treaty of Washington of 1871, which gave to the United States the right of freely navigating the river, subject to such laws of Great Britain and Canada as were not inconsistent with free navigation.

THE SUEZ CANAL.

In 1854 a concession was granted by the Viceroy of Egypt to M. Ferdinand de Lesseps, authorizing him to construct a ship canal between the Mediterranean and the Red Seas. The concession was renewed in 1856. A company was formed in 1858 for the construction of the canal, the shares of which were originally held, partly by French citizens, partly by the Khedive of Egypt. The canal was finally constructed, and opened for traffic in 1867, the works being carried out under the superintendence of French engineers. In 1875 the British Government purchased from the Khedive the shares possessed by him, one of the motives of the purchase being to obtain some control over the management of the canal. Recently an arrangement has been come to between M. de Lesseps and some leading representatives of British shipping, by which the British element in the directorate has been strengthened.

Some discussion has meanwhile taken place as to the international position of the canal, and also as to its neutralization in time of war.

The canal itself occupies a peculiar position. It is an artificial waterway ; it lies wholly within Egyptian territory, Egypt itself being a tributary State of the Turkish Empire ; as a mercantile institution it is the property of a French company ; whilst by far the largest proportion of vessels using it are British. It is contended by some, that, in virtue of the principle established by the Congress of Vienna in 1815, all States have a right of unimpeded navigation, subject to the payment of mercantile dues. Some English writers, whilst not admitting that the principle of 1815 applies to the navigation of an artificial waterway, yet claim for Great Britain a right of passage, and, if need be, a right of control, on the ground of its essentiality to her, as a maritime route to India.

With regard to the question of neutralization, in 1877 M. de Lesseps submitted to the British Government a project for securing the neutrality of the canal, in the form of an international agreement. The British Government was unable to recommend the project for the acceptance of other Powers, but stated that an intimation had been given to the Russian Ambassador (Russia being then at war with Turkey) that any attempt to blockade or otherwise interfere with the canal or its approaches, would be regarded as a menace to India and a grave injury to the commerce of the world ; it was also stated that the British Government would not permit the canal to be made the scene of any warlike operations. In 1882, however, in the course of the British military operations in Egypt, the canal was occupied by the British fleet, and traffic suspended for twenty-four hours. On the 17th of March, 1885, the principal European Powers agreed to appoint a Commission for the purpose of settling a convention for the establishment of the free navigation of the canal. The Commission was accordingly appointed and drew up a scheme ; but it was not until 1888, and after protracted negotiations, that a convention on the subject was arrived at between Great Britain, France, Germany, Russia, Austria, Italy, Spain, the Netherlands, and Turkey. By this Convention it was provided that the canal should be open to all vessels at all times, whether of peace or war ; that no acts of hostility should be committed within the limits of the canal ; that belligerent war-vessels should not be at liberty to re-victual or take in stores, or even to stay in the canal for a longer period than twenty-four hours, except in case of emergency, or as thereafter provided ; that where vessels belonging to different belligerents found themselves in the canal at the same time, then twenty-four hours should elapse between the departure of any vessel or vessels belonging to one belligerent and that of any vessel or vessels belonging to the other ; that, except in the case of accidents, subjects of either belligerent should not embark or disembark

within the limits of the canal; that prizes should be subject to the same conditions as public vessels belonging to either belligerent; and finally that the Egyptian Government should take the necessary steps to carry out the provisions of the convention, appealing to Turkey, and through Turkey to the Signatory Powers, in case of need. It was subsequently agreed between the Signatory Powers, that the provision against embarkation should not apply to the landing of unarmed invalid troops at the military hospitals of Suez and Port Said. The territorial rights of Turkey were expressly reserved by the convention, as were also the Sovereign rights of the Sultan and of the Khedive, except in so far as these were expressly dealt with or affected by the terms of the agreement.

Mr. T. J. Lawrence has suggested that, with the view of settling its international position for the future, a strip of territory bordering on the canal, and extending to a considerable distance on either side, should be neutralized, and converted into a new State, under the government of an hereditary prince, appointed in the first instance by the Great Powers; that the Great Powers should undertake not to attack it, and should guarantee its safety against external foes; that this guarantee should be subject to the condition that the new State pledges itself not to make war except in defence of its frontier, and not to allow any obstacle to be placed in the way of the free navigation of the canal, and further undertakes to maintain the waterway in good order, having power to levy reasonable tolls for the expense of such maintenance on all ships passing through the canal (*r*). The course of political events, however, suggests the probability that the true solution of the difficulty will ultimately be found in the neutralization of the whole of Egypt under the guarantee of the Great Powers.

THE PANAMA CANAL

Another project in some respects similar to the Suez Canal, is the proposed ship canal through the Isthmus of Panama, between the Atlantic and Pacific Oceans.

On the 19th of April, 1850, in contemplation of such a project, which was, however, to follow a different route to that of the canal since commenced by M. de Lesseps, a convention, known as the Clayton-Bulwer Treaty, was entered into between Great Britain and the United States to the following effect:—(1.) That neither Power should obtain or maintain exclusive control over the canal, or erect

(*r*) See Lawrence, p. 37.

or maintain any fortification in the vicinity, or occupy, fortify, colonise, or assume any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America. (2.) That in case of war between the parties, vessels of either party traversing the canal should be exempt from blockade, detention, or capture. (3.) That protection should be afforded to any persons undertaking the construction of the canal. (4.) Each party further undertook to endeavour to induce other States having jurisdiction over the territory to be traversed by the canal, to facilitate its construction and also to procure a free port at each end of the canal. (5.) Each party guaranteed the neutrality of the canal. (6.) Each party agreed to invite other States to enter into similar stipulations with them, and to enter into treaties with such of the Central American States as they might deem advisable for carrying out the design of the convention. (7.) Each party also agreed to extend its protection by treaty to any other practicable communications, whether by canal or railway, across the Isthmus, and especially to the interoceanic communications then proposed to be established by way of Tehuantepec or Panama, should the same prove to be practicable.

The original scheme contemplated by the convention fell through, and it was not until 1880 that any steps were taken to secure the construction of the present canal. In this year M. de Lesseps having obtained the necessary concessions, formed a company for the purpose. The canal was commenced in 1881, and its construction was proceeded with for some time, but in consequence of the insolvency of the company the operations were suspended in 1889, and the canal left in a half-finished condition. In December, 1890, the Columbian Government was induced to grant to the liquidators of the Panama Company an extension of the period provided for the completion of the canal, besides allowing a period of twenty-six months for the re-organisation of the company and the renewal of the work.

In connection with the De Lesseps Canal some discussion took place between Great Britain and the United States, with reference to the Clayton-Bulwer Convention and the future position of the Canal. The United States proposed the modification of the Convention with the view to the abrogation of the joint protectorate over the canal, and the substitution of the political control over it of the United States alone; it was also proposed that the United States should acquire the right of fortifying the canal; that a neutral zone should be laid down around the entrance to the canal on either side; that in time of peace the canal should be open to the war vessels of all nations, but that in time of war, apart from its use for the defence of the country where it was situate, the canal should be closed to all war vessels. It was also contended by the United States that the

Clayton-Bulwer Treaty was, strictly, no longer binding, inasmuch as it contemplated a canal that was never actually constructed, and inasmuch as Great Britain subsequently had acquired a colony in the place of a settlement at Belise in contravention of Article 1 of the Convention. In reply, it was urged by Great Britain that she had important interests in the locality; that the matter was also one that affected the whole civilized world; that the Convention was expressly made to extend to any future canal or canals which might be constructed; that British Honduras, where the colony referred to is situate, was expressly excepted from the Convention (*r*); and that the United States had in fact expressed their acquiescence in the possession of the colony by Great Britain (*s*). It has also been pointed out that it would be inconsistent with the meaning of "neutralization" as understood in International Law, that such a condition should be guaranteed by one Power alone (*t*).

After the failure of the Panama Company, a new scheme was undertaken by American financiers, for the construction of a ship-canal through Central America by the Nicaragua route, and an Act of Congress (1889) was passed incorporating a company for this purpose. The work was commenced in 1890, and is now in progress.

(*r*) Before the ratifications were exchanged, it was explained by the British to the American plenipotentiary that the words "or any part of Central America" were not to apply to the British settlements in Honduras or its dependencies. This explanation was adopted by the American representative; and on this basis the ratifications were exchanged, and the treaty subsequently approved by the Senate. It is not, however, admitted that the United States Senate adopted the treaty on this footing. But even without this express limitation, the reason of the thing and the settled rules of construction as

applied to treaties, would seem to indicate that this Convention could not be taken to apply to Honduras. In 1859—60, Great Britain, by separate treaties with Honduras and Nicaragua, relinquished the Mosquito Protectorate and recognized the Bay Islands as part of the Republic of Honduras.

(*s*) Parliamentary Papers, United States, No. 1, 1884.

(*t*) A very clear account of the controversy and a careful analysis of the American contention, will be found in Mr. T. J. Lawrence's *Essays*, Essay III.

PUBLIC VESSELS.

THE "PARLEMENT BELGE."*Temp.* 1880.

[L. R. 5 PROB. DIV. 197.]

Case.] In this case it appeared that a collision had taken place in Dover Harbour, between the steam tug "Daring" and the "Parlement Belge." Proceedings were thereupon instituted by the owners of the "Daring" against the "Parlement Belge" in the English Court of Admiralty. A protest was filed asserting that the Court had no jurisdiction to entertain the suit. The protest alleged that the "Parlement Belge" was a mail packet running between Ostend and Dover, that she was the property of the King of Belgium, and was therefore entitled to be treated as a public vessel of the Sovereign and State, and as exempt from the local jurisdiction. In the Lower Court this protest was disallowed.

Judgment.] On appeal to the Supreme Court the first question raised was whether the Court had power to proceed against a ship which though present in this country was at once the property of a foreign Sovereign and a public vessel of the State, it being admitted that the ship was not an armed ship of war, nor employed as part of the military force of the country. As to this the Court laid it down as a principle to be deduced from the authorities, that every State declined to exercise territorial jurisdiction over the person of the Sovereign or ambassador of any other State or over the public property of any State which was destined to public uses. The second question which the Court had to consider was whether this immunity had not been lost by reason of the ship having been used for trading purposes. As to this the Court adopted the principle, that if a vessel were declared by the sovereign authority by the usual means to be a public vessel, that declaration could not be enquired into. Moreover in the present case the ship had been mainly used for carrying the mails, and only

subserviently for the purposes of trade. The property could not be denied to be public property, and the Court was of opinion that the mere fact of the ship having been used subordinately and partially for trading purposes did not take away the general immunity. The judgment of the Court below disallowing the protest was therefore reversed, and the proceedings against the vessel were dismissed (*u*).

The Parlement Belge, L. R. 5 P. D. 197.

A public vessel is one owned and commissioned by the Government of a sovereign State. The term includes not only ships of war, but unarmed government vessels, store-ships, and transports, but not prizes until condemned and re-commissioned. Proof of the public character of such a vessel is found in the commission, in the use of flag and pendant, and, if need be, in the word of honour of the captain. In the case of the *Santissima Trinidad* (7 Wheaton, 335) (*v*), Mr. Justice Story observed that "in general the commission of a public ship, signed by the proper authorities of the nation to which she belongs, was complete proof of her national character; when duly authenticated, so far at least as foreign Courts were concerned, it imported absolute verity, and the title was not examinable."

The decision of the Court in the *Parlement Belge* shows that an ancillary use of a public vessel for the purposes of trade will not disentitle her to the privileges attaching to that character. In the previous case of the *Charkieh* (L. R. 4 A. & E. 59) (*vv*), Sir R. Phillimore adopted the principle laid down by Byngershoek, that no proceeding *in rem* could be instituted against the property of a foreign Sovereign or his ambassador, if the *res* could in any fair sense be said to be connected with the *jus coronæ* of the Sovereign or with the exercise of the functions of his ambassador; but inasmuch as in that case the Khedive had failed to establish his title to the privileges of a sovereign prince, and on the further ground that the *Charkieh* was at the time under charter for trading purposes to a British subject, he refused to recognize the claim

(*u*) Mail boats, being vessels belonging to navigation companies that possess an organized service sanctioned by their Government for the regular conveyance of the Government's postal service, occasionally enjoy under treaty some of the immunities of public vessels. This privilege is granted to enable them to keep up the regular

mail service. Such immunities generally have regard to exemption from arrest or detention, and especially as to fiscal regulations: see Ferguson, i., p. 448.

(*v*) See p. 265, *infra*.

(*vv*) The facts of this case will be found on p. 9, *supra*.

to immunity from local jurisdiction. It will be seen, however, that on the latter point, the principle here laid down, has been considerably modified by the decision of the Court of Appeal in the *Parlement Belge*.

THE "EXCHANGE" v. McFADDON.

Temp. 1812.

[7 CRANCH, 116.]

Case.] In December 1810, while on a voyage from Baltimore to St. Sebastian, "The Exchange" then the property of two American citizens, was seized by order of the Emperor Napoleon. She was converted into a French man-of-war at Bayonne, being known as "The Balaou." In this capacity she subsequently put into the port of Philadelphia, whereupon proceedings were instituted against her, with the object of procuring her restoration to her former owners. As against this, it was contended that the Court had no jurisdiction, the vessel being a public vessel and bearing the commission of a foreign Sovereign.

Judgment.] Marshall, C.J., in giving judgment stated that in default of express prohibition the ports of a friendly nation were considered as open to the public ships of all Powers with whom it was at peace. If there were no treaty on the subject, and the Sovereign of a country permitted his ports to remain open to the public ships of foreign friendly Powers, the conclusion seemed irresistible that they entered by his consent. There was, indeed, the difficulty arising out of the fact that treaties providing for the case of public vessels, provided in like manner for private vessels; and that when public ships entered a port, under a general licence implied from the absence of prohibition, it might be urged that they were in the same condition as merchant vessels entering for trade purposes, and like the latter became subject to the local jurisdiction. But it appeared to the Court that a clear distinction was in such cases to be drawn

between the rights accorded to private trading vessels and those accorded to public armed ships. A public armed ship constituted a part of the military force of her nation, she acted under the immediate and direct command of the Sovereign, and was employed by him in national objects. Interference could not take place without affecting his power and his dignity. The implied licence therefore under which such a vessel entered a friendly port might reasonably be construed, and, as it seemed to the Court, ought to be construed, as containing an exemption from the jurisdiction of the Sovereign within whose territory she claimed the rights of hospitality. He, therefore, concluded that it was an undoubted principle of public law that a national ship of war entering the port of a foreign Power did so under an implied condition of exemption from jurisdiction. Without doubt the Sovereign of the place could destroy the implication, but until this was done in a manner not to be misunderstood, the Sovereign could not be considered as having imparted to the ordinary tribunals a power which it would be a breach of faith to exercise.

As to a contention that it was the duty of the Court to enquire whether the title of the original owners had been extinguished by an act recognized as valid by national or municipal law, the learned Chief Justice held that the ship must be considered to have come into American territory under an implied condition that, while necessarily within it and demeaning herself in a friendly manner, she should be altogether exempt from the local jurisdiction.

The proceedings against the vessel were accordingly dismissed.

The Exchange v. McFaddon, 7 Cranch, 116.

The case cited is a particularly strong one, inasmuch as the title of the foreign Sovereign in this case, was notoriously wrongful and acquired in violation of that very Law of Nations under which appeal was now being made for exemption. Despite this, it was held by the Courts of the country whose subjects had been despoiled,

that it was not within their competence to enter into any question as to the earlier title or ownership of the vessel, inasmuch as she was a public armed vessel and in the service of a foreign country at peace with the United States. Marshall, C.J., it is true, upheld the fundamental principle of the exclusive sovereignty of every nation within its own limits, and refused to acknowledge any limitation on this except such as might arise from the express or implied consent of the nation itself; nevertheless he laid down equally clearly, that a public vessel belonging to a friendly State entered the territorial waters of another State upon an implied condition of immunity, this immunity resting on a presumed waiver of jurisdiction. The learned judge, indeed, qualified this principle in some measure by using the expression "and demeaning herself in a friendly manner." But this, in spite of some expressions made use of by Story, J., in the *Santissima Trinidad* (w), probably means no more than that if a public vessel were to commit any palpable act of hostility, as by commencing to fire on a town, her immunity would be at an end and she would be liable to be treated as an enemy. "The sound and true exposition of the law on this point," says Phillimore, "is that a public ship of war belonging to a State with which amicable relations exist, is exempt from the jurisdiction of the State in whose territorial waters or ports she may happen to be" (x).

A public vessel is commonly said to enjoy the privilege of extraterritoriality, in virtue of which she remains, even whilst in foreign waters, subject to the jurisdiction of the State to which she belongs. In fact, however, this doctrine does not appear to be more than a rough mode of describing certain privileges and immunities from local jurisdiction which public vessels, and certain classes of persons, such as ambassadors, foreign Sovereigns, armed forces, and European residents in certain Eastern countries, enjoy. In this character the use of the term is convenient and harmless, so long as it is not converted into an independent source of legal right (y). The privileges and immunities in question rest in fact on common usage, and especially on the practice of the great maritime nations. They are ascribable partly to comity, and partly to the mutual convenience of allowing those in command of public vessels to exercise freely and without interference, even whilst in foreign waters, those powers which the law of their own State accords to them. As was laid down in the leading case, the concession of these privileges may be assumed from the very fact that the public vessel is allowed to enter foreign harbours. Such being the general character of her privilege, it only remains to note some of its

(w) See p. 265, *infra*.

(x) See Phillimore, I., p. 481.

(y) For an account of the origin and

abuse of the doctrine of the territoriality of vessels, see Hall, p. 246.

more important applications. These are shortly as follows:—
 (1.) The vessel herself is not subject to legal process, she cannot be seized, she cannot even be brought legally within the jurisdiction of the local Courts; (2.) Her officers and crew, whilst on board, share the privilege of the vessel, and remain subject to the laws of their own country; (3.) In a minor degree and within narrower limits this privilege extends, or has at least been asserted, in respect to certain classes of persons, not members of the crew, such as fugitive slaves and political offenders, taking refuge on board; (4.) The vessel is not subject to the payment of local dues. The precise limits of these privileges will be gathered from the cases following.

2/ The position of public vessels belonging to belligerents, whilst within the territorial waters of other States, will be treated of in another place (§), but it may not be out of place here to call attention to the fact that the majority of the members of the Tribunal of Arbitration at Geneva, in their award and as one of the reasons for their judgment, stated that "the privilege of extritoriality, accorded to vessels of war, had been admitted into the Law of Nations not as an absolute right, but solely as a proceeding founded on the principle of comity and of mutual deference between different nations, and could, therefore, never be appealed to for the protection of acts done in violation of the Law of Nations."

THE "CONSTITUTION."

Temp. 1879.

[48 L. J., N. S., P. D. & A. 13.]

Case.] In this case proceedings had been taken to obtain warrants of arrest against the United States frigate "Constitution" and the cargo on board of her, in order to recover compensation for salvage services rendered to her by the steam-tug "Admiral." It appeared that the "Constitution" was an American ship of war, and was in January, 1879, employed in bringing back to America goods belonging to American exhibitors at the Paris Exhibition. The "Constitution" having stranded near Swanage, several tugs and boats came to her assistance, and ultimately she was got off, the steam-tug "Admiral" being among the vessels employed in the salvage.

(a) See p. 278, *infra*.

The owners of that vessel were offered £200 for salvage service, but deeming this insufficient, they instituted proceedings against the "Constitution" in the Admiralty Division of the High Court. At the hearing both the American Legation and the Crown were represented, and the Court was informed that the "Constitution" was a public vessel belonging to the United States, holding a commission and employed on the public service. The salvors contended, however, that the cargo at least was private property, and not entitled to privilege at International Law.

Judgment.] Sir Robert Phillimore in his judgment expressed an opinion that if he were to exercise jurisdiction in the case, he would be doing that for which there existed no direct precedent; on the contrary he had no doubt as to the general proposition that ships of war belonging to another nation with whom Great Britain was at peace, were exempt from the civil jurisdiction of the British Courts, and there were no peculiar circumstances to take the case out of that general proposition. Adverting to the case of the *Charkieh*, the learned judge stated that he might, in his judgment in that case, have let drop some expressions capable of giving rise to an impression that a foreign ship of war was liable to arrest, but in that case the question, as it was now raised, had not to be decided. He now felt no doubt that it would be improper to accede to the request of the owner of the steam-tug; nor did he see any distinction between the issue of a warrant in the case of the ship and in that of the cargo, the latter being on board a foreign vessel of war, and under the charge of a foreign Government, for public purposes. The proceedings were accordingly dismissed with costs.

The Constitution, 48 L. J., N. S., P. D. & A. 13.

Before the decision in the case of the *Constitution*, some doubt seems to have existed as to whether salvage proceedings might not be instituted in an English Court of Admiralty against a public vessel. In the case of the *Charkieh*, (L. R. 4 A. & E. 59) Sir R. Phillimore had said, 'It is by no means clear that a ship of war to which salvage services have been rendered, may not,

jure gentium, be liable to be proceeded against in the Court of Admiralty for the remuneration due for such services." In the much earlier case of the *Prins Frederik* (2 Doda. 451), a Dutch man-of-war, whilst on a voyage from Batavia to the Texel, had been partially disabled by stress of weather off the Scilly Isles, and was brought into Mount's Bay with the assistance of the master and crew of a British brig, belonging to the port of Penzance; the '*Prins Frederik*' was at the time employed in bringing home a cargo of spice belonging to the Dutch Government, and for this purpose some of her guns had been removed; the salvors instituted salvage proceedings against the vessel, on the ground that she had for the time being at least lost the character and privileges of a public vessel, and also on the further ground that such proceedings, being *in rem* and not against the King of the Netherlands personally, were under any circumstances admissible. According to Lord Campbell, who quoted this case in 1851 (17 Q. B. 212), Lord Stowell took a strong view against the asserted jurisdiction. To avoid difficulty, however, Lord Stowell caused a representation to be made to the Dutch Government, who consented to his disposing of the matter as arbitrator; acting under this authority, Lord Stowell awarded the sum of 800*l.* and costs to the salvors.

The decision in the case of the *Constitution*, however, has now set any such doubt at rest.

Nor is a public vessel in other respects bound by local law. She cannot be seized for wrong-doing, short of "acts of hostility." She is not liable to local dues, such as harbour dues, light dues, or customs dues. She is not, in general, liable to search by customs officers, though the English law on this point appears to be exceptional. Thus, by the Customs Consolidation Act 1876 (22), sect. 52, the officer in charge of any public vessel, whether British or foreign, having goods on board laden abroad, is bound on arriving in any port of the United Kingdom, and before any goods are removed from the ship, on demand of a customs officer, to deliver an account of the goods on board; such ships are, moreover, made liable to search, and the necessary powers for this purpose are given to customs officers.

Although in other countries, a public vessel is commonly exempt from the operation of the local revenue laws, yet she must not be made a medium for smuggling. Both sanitary and harbour rules ought to be observed, and due respect ought to be shown to the laws and government of the State in which such vessel finds herself. If a public vessel should fail in respect of these obligations, representations should be made to the Government to which she belongs; whilst in extreme cases she may be summarily ordered to

leave, or expelled by force. If damage is done by her, the local Court may sit as a Court of enquiry, and any claim so established may be urged diplomatically. In at least one case, the British Admiralty has paid damages awarded by a foreign Court against the captain of a British ship of war, in respect of a collision between that vessel and a private vessel of the port. But, such proceedings are only a means of establishing the facts which have occurred, and the judgment given can only be used in support of a diplomatic claim, when its justice is not voluntarily recognized (*a*).

THE "SITKA."

Temp. 1855.

[OPINIONS OF U. S. ATTORNEYS-GENERAL, VOL. VII., p. 122.]

Case.] In 1856, during the Crimean war, the *Sitka*, a Russian ship, was captured by a British man-of-war, and brought into San Francisco with a prize crew on board. An application for a writ of *habeas corpus* was made to the United States Courts on behalf of two prisoners on board for the purpose of trying the validity of their detention. Process was served on board; but this was ignored by the commander of the "Sitka," who got under weigh and left the port with the prisoners on board.

Opinion.] The opinion of Mr. Cushing, the Attorney-General of the United States, was subsequently taken as to the conduct of the commander of the ship. He pointed out that judicial decisions had settled the point, that, except where there had been a violation of its neutrality as in the case of the *Santissima Trinidad* (*b*), the Court of a neutral State had no jurisdiction to decide on the validity of a capture made by a belligerent. He also pointed out that the Courts of the United States had adopted almost unequivocally the doctrine that a public ship of war of a foreign sovereign at peace with the United States, coming into her ports and demeaning herself in a friendly manner, was exempt from the jurisdiction of the country. The ship in this case remained a part of the territory of the sovereign into whose possession she had passed;

(*a*) See Hall, p. 194.

(*b*) See p. 265, *infra*.

this was threatened with invasion by the local Courts, and it was not only lawful but highly discreet in the captain to depart and thus avoid unprofitable controversy.

The Sitka: Opinions of U. S. Att.-Gen., Vol. VII., p. 122.

This case is cited as illustrating the immunity of a public vessel from having process served on board.

In an earlier case, of the *Chesterfield*, 1799 (c), the question as to whether process could be lawfully served on a British man-of-war lying within the territorial jurisdiction of New York, seems to have been answered in the affirmative. The Attorney-General, Charles Lee, whose opinion was taken, pointed out that by the 28rd Article of the Treaty of London, it had been provided that ships of war of each contracting party should be hospitably received in the ports of the other subject to their officers and crew paying due respect to the laws and government of the country, and that to disobey judicial process or resist it on board the ship, was inconsistent with such due respect; he also pointed out that the lawfulness of serving process on board such ship was impliedly admitted by an Act of Congress passed on the 5th of June, 1794, providing that in any case where the process of the United States should be disobeyed by any person having the custody of any war vessel of a foreign prince, it should be lawful for the President of the United States to employ such force as should become necessary; under these circumstances, he was of opinion that it was lawful to serve process as suggested.

On the strength of this opinion, apparently, it is sometimes laid down that, according to the law of the United States, a writ of *habeas corpus* may be lawfully awarded to bring up a subject illegally detained on board a foreign public vessel in American waters (d). Phillimore suggests that the same doctrine would probably be acted upon by the Courts of Great Britain (e). But the expressions used in the case of the *Sitka* seem to indicate that the doctrine at one time adopted by the United States has since undergone a change. Moreover, if it be true, as is suggested by Mr. Cushing in the case of the *Sitka*, that a public vessel constitutes by the Law of Nations a part of the territory of its Sovereign, it seems clear that any United States law authorizing the execution of such process would be in derogation of the Law of Nations as recognized by the United States, and that the United States Executive, in giving effect to any such municipal rule, would admittedly expose itself to recrimination and reprisals.

Subject to this possible exception, however, it appears to be the settled practice to treat those on board a public vessel lying

(c) Opinions of U. S. Attorneys-General vol. i., p. 87.

(d) See Kent, p. 371.

(e) See Phillimore, I., p. 482.

within the territorial waters of another State, as exempt from the territorial jurisdiction, and as governed in all matters, public and private, by the law of their own country. If the crew offend on shore but regain the ship, they cannot be forcibly seized, and their surrender ought to be asked for. But if they offend on shore and are arrested there, they may be detained and punished by the local magistrates, although notice of the arrest ought to be given to the captain. In other cases, if those on board are guilty of offences against the local law, the aggrieved State ought (except in extreme cases), to apply for redress to the government of the country to which the vessel belongs.

It is sometimes suggested that this immunity extends to persons taking refuge on board, such as political refugees and offenders. As to these, there is scarcely any doubt that they cannot be forcibly retaken, from a public vessel. But the action of the vessel in receiving such persons might and would be a proper matter for protest and recrimination; and if the vessel were allowed to become a centre of political intrigue or an asylum for criminals, she might very reasonably be required to leave, or, if need be, expelled. The question as to how far such persons ought to be surrendered, is in the main a question of policy, and one dependent on the circumstances of each particular case. Political refugees have, no doubt, often been received on board British men of war. The Admiralty instructions to officers in command state that "during political disturbances or popular tumults refuge may be afforded to persons flying from immediate personal danger." In 1849, it was stated, with the authority of Lord Palmerston, that although it would not be right to receive and harbour on board a British ship of war any person flying from justice on a criminal charge or who was escaping from the sentence of a Court of law, yet a British ship of war had always and everywhere been looked on as a safe place of refuge for persons of whatever country or party who had sought shelter, under the British flag, from persecution on account of their political conduct or opinions. As Mr. Hall, however, observes, persons who are in danger of their lives from political acts are usually looked upon as criminals by the successful party, so that the distinction here drawn is merely one of propriety (*f*). Whether, therefore, political refugees ought to be surrendered, must in effect remain a question of policy to be dealt with according to circumstances of time and place. Strictly, it would seem that they ought not to be received. The privilege of extritoriality has the effect of exempting the vessel from local jurisdiction; but even if we give the fullest force to this doctrine, it would scarcely warrant a vessel in enforcing the law of her own State within the territorial waters of another country. Neverthe-

(*f*) See Hall, p. 190.

less, the receiving of such a political refugee or offender on board and the refusal to surrender him might well be justified in exceptional cases on grounds of policy and humanity. In the case of John Brown, an Englishman who had been in command of one of the insurgent vessels at the time of the revolt of the Spanish Colonies in 1819, had been captured by the Spaniards and thrown into prison at Lima; he subsequently escaped to the British man-of-war "Tyne;" the Spanish authorities demanded his surrender, but this was refused by Captain Falcon, the commander of the "Tyne," and Brown was brought home. The Secretary of the Admiralty afterwards asked Mr Scott (afterwards Lord Stowell) his opinion on the general question, whether a British subject coming on board a British man-of-war in a foreign port, in order to escape from civil or criminal process in that port, could claim the protection of the British flag, to which he replied in the negative, stating that Captain Falcon's act was more to be commended for its humanity and spirit than for its strict legality.

In dealing with the question as one of policy and humanity, the condition of the country, the circumstances and conduct of the contending parties, may fairly be taken into account.

In the case of those countries that adopt the doctrine of the territoriality of public vessels, it might of course be contended that a political refugee was exempt from surrender, in the same fashion as he would be; if he had escaped to the territory of the State to which the vessel belonged; but this doctrine does not harmonize with admitted practice, nor is it universally or even generally accepted.

In the case of fugitive criminals accused of non-political offences, there is little doubt that these ought to be surrendered. If, indeed, the accusation of crime should prove to be merely a colourable pretext for procuring the surrender of a political refugee, then the question of surrender would have to be dealt with on the principles already described. Even if there were reasonable ground for supposing this to be so, it would justify a refusal to surrender, until the officer in command had satisfied himself of the true facts of the case.

FORBES v. COCHRANE.

Temp. 1824.

[2 B. & C. 448.]

Case.] The plaintiff was a British merchant residing in East Florida, which was then under the jurisdiction of Spain, and in which the institution of slavery was recognized by law. During

war between Great Britain and the United States, Sir A. Cochrane, commander-in-chief of the British fleet on the American station, presumably with the view of hampering the United States authorities and taking advantage of discontent thought to prevail amongst the slaves of the district, issued a proclamation to the effect that any such persons would be received on board the British men-of-war. In consequence of this proclamation having reached the adjoining Spanish territory, a number of the plaintiff's slaves deserted him and escaped to H.M.S. "Terror Bomb." They were afterwards transferred from that ship to H.M.S. "Albion," commanded by Sir G. Cockburn, the second officer in command on the station, and taken to Bermuda. After the war the present action was instituted against Sir A. Cochrane and Sir G. Cockburn to recover damages for the detention of the slaves.

Judgment.] It was held that the action could not be maintained. Bayley, J., grounded his judgment on the fact that no *mala fides* on the part of the defendants had been shown; that, on the contrary, they had offered to allow the slaves to go, if the plaintiff could persuade them, and that this having been done the defendants were not further bound to take active efforts in delivering up the slaves. Holroyd, J., adopted the view that where a slave escaped into a country where slavery did not prevail there was no right of action against a party who received him there, that for this purpose a British war-ship must be considered as a floating island, subject to the laws of England alone, and that the slaves therefore had ceased to be slaves according to the law which prevailed on board the British ship. Best, J., also held that when a slave arrived on a British man-of-war not lying within the waters of East Florida he ceased to be a slave.

Forbes v. Cochrane, 2 B. & C. 448.

Where fugitive slaves take refuge on board a public vessel of a nation not recognizing slavery, lying within local waters, there is

no doubt that these cannot be forcibly recovered. On the other hand, there seems equally little doubt that if this occurs within the local jurisdiction, they ought strictly to be surrendered. To refuse to surrender would practically be to enforce the law of the country to which the ship belongs, within the territorial waters of another State. In the leading case, stress was laid on the fact that the British ships were not, at the time when Sir G. Cockburn refused to hand over the slaves to the plaintiff, within the waters of East Florida. Bayley, J., stated that his opinion did not proceed on the ground that slavery was not to be tolerated in the place where the slaves had escaped, nor that an action might not, under circumstances, be maintained for enticing away or harbouring slaves there. Holroyd, J., added that if the British vessel had been within the waters of East Florida undoubtedly the local law would have prevailed. It appears, also, to have been the practice, prior to 1875, to surrender slaves who had taken refuge on board British war vessels lying in the waters of States where slavery existed under the sanction of the territorial law (*g*).

On the 5th of December, 1875, the British Government issued certain instructions in which it was (*inter alia*) provided that a fugitive slave should not be received on board a public ship on the high seas, unless the commander was satisfied that there was some sufficient reason for receiving him; nor in the territorial waters of a State where slavery existed, unless the life of the fugitive would be in manifest danger if he were not received on board; if received in order to be saved from this danger, he was not to be allowed to continue on board after the danger was past, but a demand for his surrender was not to be entertained, nor an examination as to his status entered into. The publication of these instructions caused a great sensation throughout the country, and the Government, in deference to the public feeling in the matter, issued a commission, authorizing an enquiry into and report upon, the nature and extent of the international obligations as to the reception of fugitive slaves by H.M. vessels whilst in the territorial waters of other States. The commissioners, after inquiring into the law and practice of both Great Britain and foreign countries, issued an elaborate report, dated 30 May 1876, containing certain recommendations (*h*). In consequence of this, the following instructions to all commanders in chief, captains, commanders, and commanding officers of H.M. ships and vessels, were issued in August 1876, in lieu of those of 1875:—

(1.) In any case in which you have received a fugitive slave into your ship and taken him under the protection of the British flag, whether within or beyond the territorial waters of any State, you

(*g*) See Hall, p. 189.

(*h*) See Phillimore, I., pp. 437—440.

will not admit or entertain any demand made upon you for his surrender on the ground of slavery. (2.) It is not intended, nor is it possible, to lay down any precise or general rule as to the cases in which you ought to receive a fugitive slave on board your ship. You are, as to this, to be guided by considerations of humanity, and these considerations must have full effect given to them, whether your ship is on the high seas or within the territorial waters of a State in which slavery exists; but in the latter case you ought, at the same time, to avoid conduct which may appear to be in breach of international comity and good faith. (3.) If any person, within territorial waters, claims your protection on the ground that he is kept in slavery contrary to treaties with Great Britain, you should receive him, until the truth of his statement is examined into. This examination should be made, if possible, after communication with the nearest British consular authority, and you should be guided in your subsequent proceedings by the result. (4.) A special report is to be made of every case of a fugitive slave received on board your ship.

These instructions are sufficiently vague, and appear to be a compromise between the strict requirements of International Law and the dictates of humanity. The question, however, is no longer one of much importance. After the abolition of the status of slavery by the United States in 1865, Brazil and Cuba were the only Christian States in which slavery continued as a legal institution. In May, 1888, a bill for the total abolition of slavery in Brazil, was passed by the two Chambers.

THE "MARIANNA FLORA."

Temp. 1826.

[11 WHEATON, 1.]

Case.] On the 5th of November, 1821, the United States armed schooner "Alligator," whilst on a cruise against pirates and slave-traders, came across the Portuguese ship "Marianna Flora," bound on a voyage from Bahia to Lisbon, with cargo. The fact of the "Marianna Flora" having shortened sail, and of her having a vane or flag on her mast somewhat below the head, together with her other manœuvres, induced Lieutenant

Stockton, the commander of the "Alligator," to suppose she was in distress or wished for information. He accordingly approached her, whereupon the "Marianna Flora" fired on the "Alligator." The firing was repeated, and mutual hostilities took place, which resulted in the surrender of the Portuguese vessel. The Portuguese officers stated that they took the "Alligator" to be a piratical cruiser. Ultimately the "Marianna Flora" was sent by Lieutenant Stockton into Boston and charged with piratical aggression. Upon the hearing, the ship was restored by the District Court, and damages were awarded for the act of sending her in. On appeal to the Circuit Court the decree for damages was reversed, the ship being restored by consent. An appeal on the question of damages was then taken to the Supreme Court.

Judgment.] This Court expressed the opinion that ships of war, sailing under the authority of their Government to arrest pirates, were entitled to approach vessels for the purpose of ascertaining their real character. On the other hand, no ship in time of peace was bound to lie by and await the approach of any other ship; she was entitled to pursue her voyage in her own way, and to use all necessary precautions to avoid any suspected sinister enterprise or hostile attack; she might consider her own safety, but she must take care not to violate the rights of others. She might use any precautions dictated by the prudence or the fears of her officers, either as to delay or the progress or course of her voyage, but she was not at liberty to inflict injuries upon other innocent parties, simply because of conjectural dangers. After reviewing the facts of the case, the Court was of opinion that the conduct of Lieutenant Stockton in approaching and ultimately taking possession of the "Marianna Flora" was entirely justifiable. With regard to the question of damages, it was laid down that if damages were given it would be going a great way towards declaring that an exercise of honest discretion ought to draw after it the penalty of damages. Moreover, no decision had been cited in which the capture

itself having been justifiable, the subsequent detention for adjudication had ever been punished by the award of damages. The decision of the Circuit Court reversing the decree for damages was accordingly affirmed.

The Marianna Flora, 11 Wheaton, 1.

It is especially the duty of a public vessel to keep the police of the seas and to put down pirates. For this purpose a public vessel has a right of approach, and, in cases of suspicion, a right of further investigation (*i*). The case cited indicates that a public vessel cannot be rendered liable for consequences accruing from an honest attempt to discharge these duties.

In addition to her right of approach, a public armed vessel is both by the rules of comity and by maritime usage, entitled to the salute of private vessels on the high seas. The salute may take the form of firing a cannon (*salut du canon*), or of striking the flag (*salut du pavillon*), or of lowering the sails (*salut des voiles*) (*k*).

It is also the custom for ships of war to salute other ships of war of superior rank—for a single ship of whatever rank to salute a fleet or squadron—and for an auxiliary squadron to salute the principal fleet (*l*).

Under the British Admiralty Regulations, a British warship meeting on the sea a foreign warship, bearing the flag of a flag officer or the broad pendant of a commodore commanding a station or squadron and superior in rank to the commander of the British ship, is required to salute the latter with the same number of guns to which a British officer of corresponding rank would be entitled, upon being assured of receiving a similar salute in return—gun for gun; and even in a foreign port similar complimentary salutes are required to be given, if the regulations of the place admit of this being done.

The relations of British private to British public vessels are strictly a matter of municipal regulation only. It may not be out of place, however, to point out that a British merchantman is, in strictness, under an obligation to salute a British warship, and that any failure to observe this obligation may be visited with punishment, as against the master, by the Court of Admiralty. Thus, in 1829, the Court of Admiralty issued a warrant of arrest against the

(*i*) See p. 344, *infra*, as to how far a right of visit exists in time of peace.

(*k*) See Ortolan, ii., c. 15.

(*l*) See Phillimore, II., p. 54.

schooner "Native" for contempt in passing H.M.S. "Semiramis," without striking or lowering her royal, this being the uppermost sail which she was then carrying (*m*).

The wearing or hoisting of illegal or unauthorized colours by British merchant vessels, is forbidden by the Merchant Shipping Act, 1854 (*mm*), s. 105, under severe penalties. Such illegal or unauthorized colours may also be seized and confiscated by British naval, military, or consular officers. This includes the case of a private vessel flying the colours of a public vessel. In the case of *R. v. Benson* (3 Hagg. 96), proceedings were taken against the master of a merchantman for hoisting the King's colours in or near the Douro; the defendant was ordered to pay the statutory penalty, the Court pointing out that going into the Douro under colours usually hoisted by the King's ship, at the time in question, might have cast doubt on the neutrality and have affected the honour of Great Britain.

PRIVATE VESSELS.

THE "ATALANTA."

Temp. 1856.

[OPINIONS OF U. S. ATTORNEYS-GENERAL, VOL. VIII., p. 73.]

Case.] The "Atalanta" was an American merchant vessel. Whilst on a voyage from Marseilles to New York, acts of insubordination and violence occurred on the part of her crew, in consequence of which the master was compelled to return to Marseilles. After the arrival of the ship at that port, on the application of the American Consul, all those concerned in the offence were committed to prison by the local authorities. A few days afterwards, with the consul's assent, a number of them were released, but thirteen were retained under restraint. Of these six were sent on board the "Atalanta" to be taken to the United States for trial. Subsequently, with the knowledge of the consul, but in spite of his protests, the local authorities went on

(*m*) See Phillimore, II., p. 56.

(*mm*) 17 & 18 Vict. c. 104.

board the "Atalanta," re-took the six men, and again imprisoned them in Marseilles, together with the seven others who had not been taken on board. Some correspondence ensued with reference to the matter, and ultimately the opinion of the United States law officers was taken on the case.

Opinion.] The Attorney-General in the first place expressed the opinion that it was immaterial whether the persons so imprisoned were citizens of the United States or not; nor did he consider that the question turned either on the criminal jurisdiction of consuls under the Consular Convention of 1853 between France and the United States, or on the question of the extritoriality of merchant vessels whilst in territorial waters. The real issue was whether, in the event of a crime being committed on board an American ship on the high seas and within the sole competency of the United States, and in the event of that ship subsequently putting into a French port, the criminal could be forcibly withdrawn from the ship by the local authorities or by order of the French Government. In his opinion, when the ship arrived at Marseilles the master had lawful power, with the aid of the consul if required, to retain the men on board. The fact that they had committed crimes on board the ship outside the local jurisdiction, for which crimes they were liable to be punished on her reaching New York, did not give the local authorities any right to interfere. If the crime had been committed while the ship lay in territorial waters, the local authorities would have had jurisdiction, and might have gone on board to seize the prisoners; but this would not be so where no act had been done to give any jurisdiction over the case to France. The consul had acted lawfully when, at the first stage of the transaction, he had requested the local authorities to take temporary charge of the prisoners. It was the duty of the local authorities to assist him by the express terms of the convention between the United States and France. He conceded in the fullest terms the integrity of the local sovereignty; and that, instead of contradicting, seemed to corroborate his view of the subject;

for how could consuls maintain the internal order of their own merchant vessels except through the assistance of the local jurisdiction.

But however this might be, it was clear, in his opinion, that the local authorities, even if they might have refused aid, had at least no right to interpose to defeat the lawful confinement of any members of the crew by the master on board the ship with the advice and approbation of the consul. According to the doctrines laid down by her own jurists, France had no jurisdiction in the present case.

Whilst admitting that the local authorities had jurisdiction in regard to crimes committed on board a merchantman in territorial waters, he denied that they had any right to interfere with persons lawfully detained on board the ship by the laws of the country to which she belonged, for crimes committed on the high seas among members of the crew, and not justiciable by the foreign jurisdiction. France could not deny this exemption, when she herself claimed to extend it so much farther.

The doctrine of the public law of Europe on this point was well stated by Riquelme to the following effect: viz., that crimes committed on the high seas, whether on board war-ships or merchantmen, were to be considered as committed in the territory of the State to which the ship belonged, and that if the ship arrived in port, the jurisdictional right of the territory to which the ship belonged, did not on that account cease; when the crime was committed in territorial waters, in the case of warships, the principle of extritoriality protected the ship; in the case of a merchantman, and in the absence of treaty—even then, if the offence affected only the interior discipline of the ship, the local authorities ought not to deal with the case unless their assistance was requested; but if the offence was committed against a subject of the country or another foreigner, or if it was calculated to disturb the tranquillity of the port, then the territorial jurisdiction was entitled to punish the crime.

In the present case, therefore, he failed to see on what ground of strict international right the local authorities had proceeded.

The Atalanta : Opinions of United States Attorneys-General, Vol. VIII., p. 73.

“Private vessels are those which, whilst being the property of private owners, yet satisfy such conditions of nationality as may be imposed by the State to which they belong, with reference to ownership, place of construction, the nationality of the captain or the composition of the crew.” The documents looked to in ascertaining the character of the vessel, the nature of her cargo, and the ports between which she is voyaging, according to English practice, are as follows :—(1) the register, specifying the owner, the name of the ship, and other particulars necessary for verifying her identity and nationality, (2) the sea letter, (3) the muster-roll of her crew, (4) the log-book, (5) the charter-party, (6) the invoices of the cargo, and (7) the bills of lading (*n*).

In general the national character of a private vessel depends on the national character of the owner as ascertained by his domicile. By the law of England no ship is to be deemed a British ship unless she belongs either, (1) to natural born British subjects, or (2) to persons naturalized in British dominions or made denizens by proper authority, or (3) to corporate bodies established under the laws of, and having their principal place of business in, the United Kingdom or some British possession. Every British ship is required to be registered as provided by the Merchant Shipping Act, 1854. If any person uses the British flag or assumes the British national character, on board any ship owned in whole or in part by any persons not entitled by law to own British ships, for the purpose of making such ship appear to be a British ship, such ship shall be forfeited to her Majesty, unless such assumption has been made for the purpose of escaping capture by an enemy or a foreign ship of war, in the exercise of some belligerent right; and in any proceeding for enforcing any such forfeiture, the burden of proving a title to use the British flag and to assume the British national character shall lie on the person assuming the same. A similar penalty may be incurred by concealment of British or by the assumption of a foreign character (*o*).

The jurisdiction to which a private vessel is subject differs accord-

(*n*) See Hall, p. 161; and see also Appendix II.

(*o*) See 17 & 18 Vict. c. 104, Part

2, s. 10 and 19, and s. 103, sub-ss. 1 and 2.

ing to whether she is on the high seas, or passing through foreign territorial waters, or lying in a foreign port.

A merchant ship on the high seas is subject only to the jurisdiction of the State to which she belongs, except in cases of piracy (*p*). Such State is entitled to exercise administrative and criminal jurisdiction in respect of acts committed on board, whether by its own subjects or foreigners. In the case of crimes committed on the high seas, all authorities combine in declaring such offences to be subject to the jurisdiction of the country to which the ship belongs, and it matters not that the criminal or the injured party or both belong to some other country (*q*). In civil cases, also, the State has full jurisdiction over its subjects on board, and the same jurisdiction over foreigners as it has when they are in its territory, subject to any exemption that may exist by the municipal law. The State to which the vessel belongs is also entitled to protect the vessel against interference by other nations, unless she has committed some act of hostility against another State or some act which a belligerent is entitled to restrain, or unless she has escaped on to the high seas after violating the laws of another country while within its waters, in which last case she remains amenable to the local jurisdiction. On the same principle a State is responsible for the acts of its private vessels on the high seas, and is bound to afford proper redress through the medium of its Courts for wrongs that may have been sustained by subjects of other countries, except in so far as these are mere violations of belligerent rights or constitute acts of piracy.

As to merchant vessels passing through territorial waters, but not at rest in the harbours of a foreign State, in *Reg. v. Keyn* it was held that in the view of the English law at least the territorial jurisdiction did not extend to crimes committed by foreigners in passing vessels belonging to another State, but this defect has now been in some measure amended by the Territorial Waters Jurisdiction Act, 1878 (*r*). On principle it would seem, although there is no clear usage on the matter, that the merchant vessel may be made amenable to the territorial jurisdiction as fully as if within port, although the State has no interest in enforcing its jurisdiction except in regard to acts taking effect outside the ship. The exercise of jurisdiction in such cases, therefore, is generally confined to acts involving a violation of its revenue or fishery laws, its fiscal or quarantine regulations, or local rules of navigation, or involving reckless conduct endangering the lives of persons outside the ship, or crimes of violence committed on such persons. In such cases, as Mr. Hall points out, not only is the local State interested, but it may

(*p*) As to Slave Trading, see *infra*, p. 124.

(*q*) See *Reg. v. Lewis*, 5 W. R. 572.
(*r*) 41 & 42 Vict. c. 73. See p. 28, *supra*.

reasonably be unwilling to trust to justice being done with respect to them by another State, whilst it is also more favourably placed for arriving at the truth and for administering justice than the country to which the vessel belongs (*s*).

As to merchant vessels in foreign ports, they are here clearly subject to the local jurisdiction. Both the vessel and those on board her are, strictly, subject to the authority of the local Courts in regard to all criminal offences, whether committed on ship or on shore. Both Great Britain and the United States act on this principle, except where modified by convention.

The French Courts, however, refuse to interfere except when the peace of the port is disturbed, or where natives or foreigners are concerned; whilst in the case of French vessels in foreign ports, the French consul is required to resist the application of the local authority except in similar cases (*t*).

In many instances consular conventions have been entered into, to the effect that where a merchant vessel of one State enters the waters of another, the consul of the State to which the ship belongs shall have exclusive jurisdiction over matters that concern only the internal order of the vessel, and that the local authorities shall only exercise jurisdiction where the peace or public order of the locality is disturbed, or where persons other than the officers and crew are concerned (*u*). Mr. Hall suggests that it might be advisable that principles to this effect should be adopted into the recognized usage of nations. But until this is done, and in default of treaty or convention, this distinction between different kinds of offences cannot be said to obtain; the only distinction recognized being between offences committed on board a public vessel, which are left to the jurisdiction of the ship, and offences committed on board a private vessel, which are subject to the local authority (*v*).

It needs to be observed that, whilst Great Britain recognizes the right of other States to punish crimes committed on board British vessels in foreign harbours, she at the same time claims jurisdiction to punish such crimes, where they have not been punished by the local authority. The criminal law of England extends to all offences committed on British ships, either by British subjects, or by foreigners, either on the high seas or in foreign harbours, or rivers below bridges where great ships go. Thus in *Reg. v. Anderson* (L. R. 1 C. C. R. 161), it was held that a crime, committed by an American sailor on board a British ship lying in a French river, about thirty-five miles away from the sea, and within 300 yards from the shore, was within the

(*s*) See Hall, p. 202.

(*t*) See the cases of the "Newton" and the "Sally," cited p. 74, *infra*.

(*u*) See Hall, p. 200.

(*v*) A list of the conventions that have been entered into, on this subject, will be found in Hall, note to p. 200.

jurisdiction of the British Courts. But in *Reg. v. Serva* (1 Den. C. C. 104), it was held that there was no jurisdiction over an offence committed by a foreigner on board a ship that had unlawfully been seized by a British ship of war and put under the charge of a British officer. Nor will a British Court take cognisance of a crime committed by one foreigner upon another, on board a foreign vessel on the high seas (see *Reg. v. Lewis*, D. & B. C. C. 182) (x).

THE "NEWTON" AND THE "SALLY."

Temp. 1806.

[ORTOLAN, *DIPLOMATIE DE LA MER*, VOL. I., p. 271, AND ANNEXE J., p. 445.]

Case.] In 1806, while the "Newton," an American merchant ship, was in the port of Antwerp, a quarrel took place between two sailors in a boat belonging to the ship. About the same time, when the "Sally," also an American merchant ship, was in the port of Marseilles, the mate dangerously wounded one of the crew on the ship. The American consuls claimed exclusive jurisdiction in each case.

Judgment.] The cases subsequently came before the Conseil d'Etat, who pronounced in favour of the consuls, on the ground that in respect to offences and torts committed on board a foreign vessel in a French port by one of the officers or crew against another, the rights of the foreign Power ought to be regarded as exclusive of the local jurisdiction; and that inasmuch as the present matter was one that concerned the internal discipline of the vessel, the local authorities had no title to interfere, unless their protection was demanded, or the peace and tranquillity of the port were disturbed.

The Newton and the Sally, Ortolan, *Diplomatie de la Mer*, Vol. I., p. 271, and Annexe J., p. 445.

These cases are cited as illustrating French law on this subject, Antwerp being at the time under French jurisdiction.

(x) See also 17 & 18 Vict. c. 104, s. 267, and 18 & 19 Vict. c. 91, s. 21.

THE "CREOLE."*Temp.* 1842.

[PARLIAMENTARY PAPERS, 1843, VOL. LXI.]

Case.] In October, 1841, the "Creole," an American brig, left Hampton Roads for New Orleans, carrying, among other things, a cargo of slaves. On the 7th of November the slaves broke into revolt, murdered a passenger, and wounded the captain, the mate, and two of the crew. They then took the brig to Nassau, New Providence. The matter was there brought before two magistrates, who ordered the imprisonment of nineteen of the slaves, but released the others, about 113 in number, on the ground that the moment they landed on British territory they became free.

The United States Government remonstrated against this course, Mr. Webster contending that the ship having been driven into British territory by unavoidable force, those on board ought not to be held within the jurisdiction of the port. To this Lord Ashburton replied that no slave who came within British dominion would ever be restored, and that the matter in dispute was "what constituted coming within British dominions." Without expressing any opinion on this point, he suggested that the matter should be referred to the Home Government. In the result the matter was submitted to arbitration, and an indemnity awarded to the owners of the "Creole" for the loss sustained.

The "Creole" Case, Parliamentary Papers, 1843,
Vol. LXI.

The result of the "Creole" dispute seems to support the principle that a private vessel putting into a foreign port through compulsion of the crew, is in the same position as a vessel entering a foreign port through stress of weather, and is exempted from jurisdiction. The United States Attorney-General, Mr. Legare, in his opinion on this case, further expressed the view that if a vessel were driven by stress

of weather or forced by *vis major*, or in short compelled by any overruling necessity to take refuge in a port of another nation, she ought not to be considered subject to its municipal law, so far as concerned any penalty, prohibition, tax, or incapacity that would otherwise be incurred by entering such port, provided she did nothing further to violate the municipal law during her stay; the comity of nations, which was the usage, the common law of civilized nations, had gone very far on this point; if a ship were driven into port by stress of weather, and unloaded her cargo there, she would not be bound to pay duties or customs in that place because she had come there by force, nor was she liable to forfeiture; under the English Navigation Acts, it had been settled that coming in by stress of weather could not be an importation without reference to intention or *mala fides*; this was an admission that a ship, putting into port in such circumstances, was, like a ship of war belonging to a friendly Power, considered by the law of England as not subject to the municipal law; such was also the rule of the *jus gentium* (y).

The following cases illustrate respectively the exemption from ordinary liabilities which may accrue from stress of weather or from the performance of acts of generosity towards a crew itself in distress:—

In the case of the *Industria* (z), a Spanish ship had put into the port of Black River in Jamaica, in distress, with five slaves on board. The law officers of the Crown expressed an opinion that, assuming the "*Industria*" to have put into Black River in distress, she could not be deemed to have committed any offence against the laws of Great Britain, and was therefore not liable to seizure and confiscation by the civil authorities of the island. They were, however, of opinion that she might have been seized by a duly commissioned British cruiser under the treaty with Spain for the abolition of the slave trade, and carried before a Court of Mixed Commission for adjudication.

In the case of the *Fortuna* (5 C. Rob. 27), during war between Great Britain and Holland, a neutral ship was captured for breach of the blockade of the Weser, and sent home for adjudication. The master set up a defence to the effect that the want of provisions and a strong westerly wind compelled him to make for the Weser. The want of provisions was held no excuse, but Sir Wm. Scott permitted evidence as to the state of the wind to be adduced, and the ship was finally restored.

In the case of the *Jonge Jacobus Baumann* (1 C. Rob. 243), it appeared that, during war between Great Britain and France,

(y) Opinions of U. S. Attorneys-General, 98.

(z) Cited in Forsyth, p. 399.

this vessel had received on board the crew of the British frigate "Apollo," which had been found in a disabled condition by the "Jonge Jacobus Baumann." Subsequently, the English crew took possession of the vessel, brought her into an English port, and proceeded against the ship on the ground of having enemy's property on board. The ship was restored, and freight, expenses, and a reasonable demurrage were given to the owner, Sir Wm. Scott expressing an opinion in judgment, that if the ship had really belonged to an enemy, the character of enemy itself must have been blotted out by such a service as had been performed.

THE "CARLO ALBERTO."

Temp. 1832.

[SIREY'S RECUEIL, VOL. XXXII., PR. 1, p. 578.]

Case.] The "Carlo Alberto," a Sardinian steamship, secretly landed on the French coast the Duchess of Berri and several of her adherents, on the night of the 28th or 29th of April, 1832. The ship had been chartered for Barcelona, the real destination, which was to aid an insurrection against the French Government, having been concealed. In consequence of the landing of the Duchess of Berri an insurrection occurred at Marseilles on the 30th. The ship subsequently put into the port of La Ciotat in distress, and thereupon certain persons on board were arrested by the French authorities.

Judgment.] The lower Court ordered the release of the persons arrested, on the ground that the arrests were illegal, inasmuch as they were made on a foreign ship, which was to be considered as foreign territory. But this decision was reversed by the Cour de Cassation, the Court laying down in its judgment, that the privilege established by the Law of Nations in favour of allied or neutral ships, ceased when those ships, in contempt of alliance or neutrality, committed acts of hostility; that in such case they become enemies, and must submit to all the consequences of the state of aggression in which they had placed

themselves. The ship in the present case was not entitled to the privileges usually accorded to foreign ships putting into port in distress, inasmuch as the vessel had been fitted out to take part in a conspiracy, and had assisted in the execution of a crime, which the French authorities ought to investigate. On these grounds, and also on the ground that the vessel was then actually engaged in carrying persons guilty of a conspiracy against the French Government, the Court refused to recognize the exemption contended for.

The Carlo Alberto, Sirey's Recueil, Vol. XXXII., Pt. 1, p. 578.

By a humane provision of International Law, vessels putting into a foreign port under stress of weather, are usually exempted from local jurisdiction ; but according to the doctrine laid down in the leading case this will not extend to vessels committing offences in violation of the Law of Nations.

FOREIGN SOVEREIGNS.

QUEEN CHRISTINA OF SWEDEN.

Temp. 1657.

[DE MARTENS, CAUSES CÉLÈBRES, VOL. I., p. 1.]

Case.] In 1654, Christina, Queen of Sweden, abdicated her throne in favour of her cousin Charles Gustavus. After her abdication she travelled in various countries. Amongst other countries she visited France on two occasions, and whilst there was accorded royal honours, and treated by the French Government as a queen regnant. On the occasion of her second visit her chamberlain, Monaldeschi, whom she accused of treason, was put to death by her orders. The question of amenability to French jurisdiction having thus arisen, the French jurists expressed an opinion that the Queen, being an independent sovereign and being in France with the permission of the French

Government, it was not competent to refuse her the right of sovereignty over her subjects, and that all persons in her service and receiving salaries from her must be considered as such, with the exception of those who were subjects of the State where she was resident. In view of this expression of opinion, the French authorities refused to interfere.

Queen Christina of Sweden, De Martens, Causes Célèbres, Vol. I., p. 1.

The Sovereign of a country, whatever may be his title or position, whether he be the chief of a Republic, a Monarchy, or an Empire, is its formal international representative, and represents the collective power of his State. By comity and usage he occupies a peculiar position, both whilst in his own country, and whilst travelling through or tarrying in the territory of another State.

Whilst travelling through or resident in the territory of another State he enjoys all the attributes of extraterritoriality. Personally he is exempt both from the civil and criminal jurisdiction of the local Courts. As an almost necessary corollary of this, he is entitled to exercise a certain amount of civil jurisdiction over the members of his suite. He would not, indeed, be justified in exercising the full rights accorded him by the law of his own country. On this point the opinion expressed by the French jurists in the case of Queen Christina, would scarcely be adopted in the present day, and a foreign Sovereign, although exempt from the local jurisdiction, would not be warranted in exercising a criminal jurisdiction over other persons. Still if he did do so, it does not appear that there would be any remedy beyond protest or expulsion. If, indeed, in this respect or in any other, he should abuse the hospitality afforded him, he might no doubt be ordered to depart without delay, in the same way as a delinquent ambassador.

The common usage of Europe also exempts the effects of a foreign Sovereign passing through another country from the payment of custom duties and the visitation of customs officers. The same immunity is generally extended to goods destined for a foreign Sovereign or his family, in their transit through foreign countries (a).

These privileges, however, would not now be deemed to extend to Sovereigns who have abdicated. Even in the case of Queen Christina, the Queen would doubtless have been held amenable for her acts to

(a) See Phillimore, II., p. 141.

the local tribunals, had the French Government not debarred itself from taking this course, by its previous recognition of the Queen's title to the position of a Queen regnant. Nor would this exemption from local jurisdiction exist where the sovereign is a subject of the country in which the proceedings are taken, except so far as concerns acts done as sovereign in the country over which he reigns (*f*).

Even whilst in his own country, a foreign Sovereign enjoys certain international rights, which are recognized by the courts of other nations. Acts done in his capacity as Sovereign cannot be canvassed by or made the subject of proceedings against him in foreign tribunals. His public property is also exempt from their jurisdiction (*b*); although they will under certain circumstances, and at his instance, intervene to prevent the violation within their jurisdiction of the public rights of the State he represents (*c*). Not infrequently, also, the municipal law of foreign countries makes special provision for punishing offences committed within their limits against his person or reputation (*d*). As a general rule foreign Sovereigns may sue in the municipal courts of another country, not only in respect of injuries to their public rights, but also in respect of private and personal injuries (*e*). This of course does not extend to international wrongs, or wrongs done by one State to another. For such wrongs the only redress is diplomatic or military action.

The exceptions to the rule that foreign Sovereigns are not usually liable to be cited in the municipal courts of other countries are as follows:—(1) where the foreign Sovereign is at the same time a subject of the country in which the suit is brought (*f*); (2) where he has carried on trade or entered into contracts in the apparent character of, and subject to the same conditions as, a private individual (*g*); (3) where he holds or acquires immovable property within the local jurisdiction (*h*); (4) where he holds or has in the hands of his agents even movable property, not connected with the *jus coronas* (*i*); (5) or finally where he has initiated the proceedings or otherwise attorned to the jurisdiction (*k*).

(b) See *De Haberv. Queen of Portugal*, *infra*, p. 86.

(c) See *Emperor of Austria v. Day*, *infra*, p. 82.

(d) See *infra*, p. 83.

(e) In such cases it is not usual to give costs, this being regarded as a disparagement of the dignity of the Sovereign.

(f) See *the Duke of Brunswick v.*

The King of Hanover, *infra*, p. 81.

(g) See dictum of Sir Robert Phillimore, in the case of the *Charkieh*, L.R., 4 A. & E. 59.

(h) See the case of the *Swift*, 1 Dods. 320, and Foote, p. 133.

(i) See *Morgan v. Larivière*, *infra*, p. 84.

(k) See *The King of Spain v. Hullett*, *infra*, p. 86.

What has been said as to foreign Sovereigns, applies equally to foreign States. In earlier times a difficulty was felt, in the English courts at least, as to allowing a foreign State to sue in its corporate capacity, without naming its international representative or some officer of the Government. Thus, in the case of the *Columbian Government v. Rothschild* (1 Sim. 94), Sir John Leach, V.C., laid down that an unknown and undefined body, such as the Government of a State, could not sue in its quasi corporate name, and that if the persons so described could sue at all, they must come forward as individuals, and show that they were entitled to represent their State. But in the subsequent case of the *United States of America v. Wagner* (L. R. 2 Ch. App. 582), it was held by the Court of Appeal that a foreign sovereign State, adopting a republican form of government and recognized by Great Britain, could sue in its own name as so recognized, and that it was not necessary to sue in the name of any officer of the Government, or to join as co-plaintiff any such officer on whom process might be served, or from whom discovery might be obtained; at the same time, it was intimated that the Court might if necessary stay proceedings till the means of discovery were secured.

THE DUKE OF BRUNSWICK v. THE KING OF HANOVER.

Temp. 1844.

[13 L. J. N. S. 107; 11 HOUSE OF LORDS CASES, 1.]

Case.] In this case proceedings had been instituted by the Duke of Brunswick for a declaration that certain instruments appointing the Duke of Cambridge and afterwards the King of Hanover as his guardians, were void. The defendant, the King of Hanover, was served while temporarily resident in this country, and an application to the Lord Chancellor to relieve him from the process was refused. He thereupon appeared, but an appeal on the question of jurisdiction was taken to the House of Lords.

Judgment.] In the House of Lords it was held that the King's appearance was no waiver of any defence he might have, and that the refusal of the Lord Chancellor to relieve him from process had not the effect of deciding that he was liable to the

jurisdiction. It was further held that he was exempt from the jurisdiction of the Courts of this country in respect of acts done by him as King of Hanover ; but that being, also, a subject of the Queen he was liable to be sued here for acts done by him in the latter character ; and that acts done by him out of the realm, or as to which it was doubtful whether they were done by him as subject or sovereign prince, should be presumed to have been done in the latter capacity. After a review of the facts, it was held that the acts of the defendant under colour or authority of the instruments in question, were not such as would render the defendant liable to be sued in the courts of this country in respect of them.

The Duke of Brunswick v. The King of Hanover, 13
L. J. Ch. N. S. 107 ; 11 Ho. of Lds. Cases, 1.

This case is cited as illustrating the principle that a Sovereign is not amenable to the jurisdiction of foreign courts in respect to acts done by him as Sovereign. If, indeed, he should happen to be at the same time a subject of the foreign State, he would be liable to be sued in its courts in respect of acts done by him as subject ; although even in this case acts done by him out of the jurisdiction will be presumed to have been done as Sovereign. Subject to this exception it is a generally recognized rule that the municipal courts of a country will not take cognizance of political and public transactions relating to foreign Sovereigns. This will not preclude municipal tribunals from interfering, under certain circumstances, to prevent the violation of the public rights of a foreign country. Thus, in the case of the *Emperor of Austria v. Day and others* (2 Giff. 628), the defendants, Messrs. Day & Co., had manufactured in Great Britain a large quantity of Hungarian paper money on behalf of the rebel government, which was presided over by Kossuth ; proceedings were taken in England on behalf of the Emperor of Austria to restrain them from manufacturing any more, or disposing of what they had already manufactured ; the application was resisted, on the ground that the Court had no jurisdiction to inquire into a matter outside English municipal law, and relating to the public and political affairs of a foreign nation. Stuart, V.-C., in giving judgment, held that the regulation of the coin was not merely a question of municipal law ; that the prerogative of each sovereign State as to coinage was a great public right recognized and protected

by the Law of Nations; and that it was immaterial that the other defendant Kossuth, for whom the notes were manufactured, contemplated the overthrow of the plaintiff's existing rights, and only intended to use the notes after such overthrow. The injunction prayed for was accordingly granted.

Although a Sovereign is not amenable to a foreign jurisdiction for acts done in his sovereign capacity, he may nevertheless have recourse to a foreign Court for redress in the event of his being made the subject of libel, by a person residing within the foreign jurisdiction (*l*). And even apart from his seeking such redress, municipal law often provides for the prosecution of such offences by the domestic authority. Thus in English law, every one is guilty of a misdemeanour who publishes any libel tending to degrade, revile, or expose to hatred or contempt any foreign prince or potentate, with intent to disturb the peace and friendship between the United Kingdom and the country to which such prince or potentate belongs. This provision is probably limited to cases which exceed the limits of fair criticism on a matter of public interest. In *R. v. Vint* (27 St. Tr. 627), the defendant was prosecuted for an alleged libel on the Emperor of Russia. In *R. v. Peltier* (88 St. Tr. 589), a French refugee was prosecuted for a libel on Napoleon Bonaparte, then first Consul of the French Republic. In *Reg. v. Most* (L. R. 7 Q. B. D. 244), the prisoner was convicted under the provisions of 24 & 25 Vict. c. 100, s. 4, which makes it a misdemeanour for any persons to conspire or to incite to murder another person, whether such person be within British dominions or not. In this case the offence consisted in the publication of an article in a German paper published in London, exulting over the murder of the Emperor of Russia, and commending it as an example to be followed in the case of other sovereigns.

DE HABER v. THE QUEEN OF PORTUGAL.

Temp. 1851.

[20 L. J. N. S. Q. B. 488.]

Case.] An action was brought in the Mayor's Court against the Queen of Portugal, as reigning sovereign of that country, to recover a sum of Portuguese money equivalent to 12,136*l*. The plaintiff had deposited this sum with one Francisco Ferreira, a banker of Lisbon, at a time when civil war pre-

(*l*) See Phillimore, II., p. 135.

vailed between the legitimate Sovereign and Don Miguel, a pretender to the throne. This sum was paid over by Ferreira to the Portuguese Government, under the decree of a Portuguese Court. It was this sum which the plaintiff in the present case sought to recover. After the institution of proceedings an order was made attaching a sum of money belonging to the Queen of Portugal in the hands of one De Brito of the city of London. A rule *nisi* was obtained on behalf of the defendant prohibiting the Mayor's Court from further proceeding with the action.

Judgment.] On the application to make the rule absolute, it was held that the awarding of the attachment was an excess of jurisdiction, the defendant being sued as a foreign potentate, and not being amenable to the local jurisdiction.

De Haber v. The Queen of Portugal, 20 L. J. N. S.
Q. B. 488.

Just as a foreign Sovereign is exempt from personal liability in regard to acts done by him in that character, so he is exempt from any proceedings against his property, when sued in his public capacity. In *Vavasseur v. Krupp* (L. R. 9 Ch. 351), it was held that the public property of a foreign Sovereign could not become subject to jurisdiction, merely because it was tainted by the infringement of an English patent (*l*).

This rule will not apply, however, where the property is not connected with his *jus coronae*. It is generally held that the private property of a foreign Sovereign (other than his personal effects), not connected with the *jus coronae*, is liable to arrest, adjudication, and sequestration by the municipal tribunals of the country in which it is situate, and that it is also liable to the taxes and imposts of the local government; and this whether such property is vested in the Sovereign himself or in agents on his behalf (*m*). In the English case of *Morgan v. Larivière* (L. R. 7 H. L. p. 480), which arose out of a contract for the supply of cartridges entered into on behalf of the French Government in 1870, Lord Cairns remarked that even if the French Government were interested in the fund in question, yet the

(*l*) See p. 83, *infra*.

(*m*) See Phillimore, II., p. 140.

Court having a trust fund under its control might well proceed to administer it, even though a foreign government might be interested in it, and even though that government (in its sovereign capacity) might not be subject to the jurisdiction of the Court. In *Gladstone v. Musurus Bey* (9 Jur. N. S. 71), the plaintiff had obtained from the Sultan a concession for the establishment of a bank in Turkey; under the concession the plaintiff had been required to hand over to the Turkish ambassador £20,000 as caution money, to be by him deposited with the Bank of England on account of the Turkish Government; disputes having subsequently arisen, the ambassador claimed that the caution money had been forfeited, whereupon the plaintiff moved for an injunction to restrain the ambassador from causing the caution money to be paid over and the Bank from paying it over. Page-Wood, V.-C., in giving judgment, stated that if the money had been the absolute unqualified property of the Sultan, there might have been some difficulty in attaching the fund, so as to bring the Sultan within the jurisdiction, but in the present case this difficulty did not arise, as the plaintiffs throughout had contingent claims upon the fund; this being so, although the Court could not grant an injunction against the Turkish Government or its ambassador, yet an injunction could be granted against the Bank, and an order was therefore made restraining the Bank from parting with the fund, until the hearing of the action or further order. In *Gladstone v. The Ottoman Bank* (1 H. & M. 515), however, it was held that where a contract had been made with a foreign Sovereign, and the foreign Sovereign had subsequently made a grant to a third party in derogation of the rights accruing under the original contract, no proceedings would lie in the English Court against such third party.

PRIOLEAU v. THE UNITED STATES OF AMERICA.

Temp. 1866.

[L. R. 2 Eq. 659.]

Case.] The United States commenced proceedings here for the purpose of establishing their right to certain bales of cotton, then in the possession of the Mersey Docks and Harbour Board. Messrs. Prioleau, the defendants, commenced cross-proceedings against the United States and President

Andrew Johnson, for the purpose of obtaining discovery. These proceedings were demurred to by the United States.

Judgment.] It was held that the United States, having submitted themselves to the jurisdiction of the Courts of this country, Messrs. Prioleau were entitled to discovery, and that the former proceedings must be stayed until discovery was made. The Court, however, intimated that the President had been improperly made a defendant to the cross-proceedings, as the person to give discovery, inasmuch as it did not appear that the United States Government had control over their President or could compel him to make the discovery.

Prioleau v. The United States of America, L. R. 2 Eq. 659.

The principle deducible from the leading case is that if a foreign Sovereign once attorns to the local jurisdiction, he is then bound by the ordinary rules of procedure, and can claim no special exemption or privilege. Thus in the case of the *King of Spain v. Hullett* (1 Dowl. & Cl. 169 ; 1 Cl. & F. 348), it was held by the House of Lords that the King of Spain having once commenced proceedings here, although suing as a sovereign prince, and in his political capacity, was nevertheless in an English Court bound to answer on oath to a cross bill filed against him by the defendants to his suit. In the case of the *Emperor of Brazil v. Robinson* (5 Dowl. 522), the Court of Queen's Bench also decided that the Emperor having engaged in a commercial transaction, and having brought an action thereon in the courts of this country, and being resident out of the jurisdiction, was subject to the obligation of providing security for costs, like any other suitor resident out of the jurisdiction.

The principle, that if a foreign Sovereign once attorns to the jurisdiction of the municipal tribunal, he stands in the position of any other suitor, must be taken subject to the limitation imposed by *Vavasour v. Krupp* (L. R. 9 Ch. D. 351). In this case it appeared that the Mikado of Japan had bought in Germany some shells which had been lawfully made there; these having been brought to England on their way to Japan, an injunction was obtained as against the defendant Krupp, restraining the removal of the shells from England, on the ground that they constituted an infringement of an English patent; on the application of the Mikado, he was made a party to the suit, and a motion was thereupon made on his

behalf for dissolution of the injunction. On the hearing of the motion liberty was given to the Mikado to take the shells that belonged to him out of the jurisdiction. The plaintiffs appealed from this order, but the appeal was dismissed with costs. James, L.J., in giving judgment, held that a foreign Sovereign could not be deprived of his property because it had become tainted by the infringement of a patent; as to the suggestion that the Mikado had lost his privilege through submitting to the jurisdiction, it was held that he had merely submitted for the purpose of discovery, process, and costs, and not for the purpose of having his property dealt with by a Court of municipal jurisdiction in violation of his rights; no court of municipal jurisdiction was authorized to interfere with such rights. Brett, L.J., in his judgment, took a similar view with reference to the effect of the Mikado's interference in the suit, and further laid down that no English court could properly prevent him from having goods which were the public property of his own country.

ALIENS—NATIONALITY.

CASE OF MARTIN KOSZTA.

Temp. 1853.

[WHEATON'S INTERNATIONAL LAW BY LAWRENCE, 229.]

Case.] Martin Koszta, a Hungarian subject, after taking part in the rebellion of 1848-9, fled to Turkey. Here he was imprisoned by the Turkish Government at the instance of Austria, but was afterwards released on condition of his leaving that country. He chose the United States as the place of his exile, and duly declared his intention of becoming naturalized. The conditions of naturalization in the United States are five years' residence, together with a formal declaration of intention, made at least two years previous to the completion of the required term of residence. Koszta made the preliminary declaration, but before the five years had expired he returned to Smyrna, having obtained from the United States consul a travelling pass stating that he was

entitled to United States protection. While at Smyrna he was, according to Wheaton, seized by persons in the pay of Austria, taken by them to sea, thrown overboard and picked up by an Austrian man-of-war. The American consul demanded his release, and a man-of-war was sent to enforce this. The matter was ultimately compromised through the mediation of the French consul, and Koszta was sent back to the United States, although Austria reserved the right to proceed against him if he returned to Turkey.

Case of Martin Koszta : Wheaton's International Law
by Lawrence, p. 229.

This case raises several questions of International Law. The first of these is, did the incipient but incomplete naturalization of Koszta in the United States entitle him to the protection of a citizen of that country? This question was left unsettled, but Mr. Marcy, in his despatch, affirmed that whether Koszta was a United States citizen or not, the Austrian Government had no right to seize him on Turkish soil. The truth of this can scarcely be denied. On the other hand, it is difficult to say that the United States would have been justified in having recourse to force in the first instance. It was at once the right and the duty of Turkey to insist on reparation by Austria.

The law of nearly every civilized country recognizes two status, a political status or national character, in virtue of which an individual becomes a citizen or subject of a particular State, and at once entitled to its protection and liable to the obligations incident to allegiance; and a civil status, in virtue of which he becomes clothed with certain municipal rights and duties. The former depends on different laws in different countries; the latter is governed universally by the one single principle of domicile.

National character at once confers rights and imposes duties. The extent of these depends on municipal law. As long as an individual remains a citizen or subject of a particular State, that State has strictly a claim upon his service and fidelity. It has in strictness a right to prohibit him from going to a foreign country, and a right to recall him if he has already gone abroad, unless he has been, with its permission, naturalized abroad. The increased intercourse of modern times tends to render the enforcement of such claims more difficult than heretofore, but even at the present time, it is usual amongst European

States to prohibit emigration in fraud of military service and to recall subjects who have already emigrated, if the need for their service should arise (*n*).

This national character or political status depends primarily, either on locality of birth, or on the nationality of the father, or, in the case of a married woman, on the nationality of her husband ; but in most civilized States it is usually competent to a foreign immigrant into that country to renounce his former nationality, and to assume, by the process of naturalization, that of the country in which he determines to reside. In regard to political status, therefore, three questions suggest themselves :—(1) as to the primary conditions of nationality in vogue in different countries ; (2) as to the conditions under which naturalization is permitted in different countries ; and (3) as to how far such a process will be effective as against the country to which the person naturalized originally belonged. The two latter questions will be dealt with hereafter.

With regard to the first, by the law of England nationality is primarily determined by locality of birth ; in other words, every person born within the British dominions, is regarded as a natural-born British subject, whatever may have been the nationality of his father. This rule is, however, subject to various exceptions, both at Common Law and by statute. At Common Law exceptions exist in the case of the children of an English King or of an English ambassador born abroad, and in the case of the children of a foreign King or foreign ambassador born within British territory. By several modern statutes, moreover, such as 7 Anne, ch. 5., 4 Geo. II., c. 21, and 18 Geo. III., c. 21, persons born abroad whose fathers or grandfathers by the father's side were natural-born subjects, are deemed to be natural-born British subjects to all intents and purposes (*o*). In *Isaacson v. Durant* (L. R. 17 Q. B. D. 54), a question was raised as to the validity of certain votes given at a parliamentary election by certain persons who had been born in Hanover before the accession of the Queen. It was laid down in the judgment that though such persons could not have been treated as aliens, according to English law, during the time of the personal union of the two kingdoms, yet they became aliens on the severance of the two Crowns, and that it was contrary to the very doctrine of allegiance, to contend that such persons could, without more, elect to throw over their allegiance to Hanover, and put themselves in allegiance to the Sovereign of the United Kingdom.

By the law of Germany, Sweden, Norway, Switzerland, and Austria, the test of political status is found in the nationality of the parents, irrespective of the place of birth.

(*n*) See below, p. 96.

(*o*) See Stephen, *Comm.*, p. 409.

By the law of France, the test was originally the same, subject to a right on the part of a child born in France of foreign parents to elect French nationality within one year of becoming *sui juris*. This is now modified by a law of 1889, under which every individual born in France (even though of foreign parentage) and domiciled in France at the time of coming of age, is to be deemed of French nationality, unless in the year following his majority he makes a declaration of alienage, and proves that he has preserved the nationality of his parents, and that he has discharged any obligations of service imposed upon him by the country of which he claims to be a subject or member (*p*).

By the law of most of the United States, nationality is primarily determined by locality of birth. But by an Act of Congress passed in 1855, it is provided that a person born out of the limits and jurisdiction of the United States, whose father was at the time a citizen of the United States, shall be deemed a citizen of the United States, subject to the father having at some time or other resided in the United States. It was formerly laid down by eminent judges that no man was a citizen of the United States unless he was also a citizen of one of the States comprising the Union. From this it followed that persons born in the Territories (as distinct from the States) of the Union, could not be citizens of the United States. Whether this proposition was judicially sound or not, seems never to have been finally decided, but the dispute was set at rest by the Fourteenth Amendment of the Constitution, by which it was provided that all persons born or naturalized in the United States and subject to their jurisdiction, should be deemed at once citizens of the United States and of the State in which they resided, and that no State should make or enforce any law abridging the privileges or immunities of such citizens (*q*).

CASE OF SIMON TOUSIG.

Temp. 1854.

[WHEATON'S INTERNATIONAL LAW BY LAWRENCE, APP., 929.]

Case.] According to the law of Austria no Austrian subject can transfer his allegiance without the consent of the sovereign. In 1848, Simon Tousig, an Austrian subject, obtained a pass-

(*p*) See Wheaton, by Boyd, p. 246.

(*q*) See Haro, pp. 517, 518.

port allowing him to travel for one year through Germany to France and England. In 1849, without obtaining any further licence, he went to the United States. Here he proposed to become naturalized, but before completing his naturalization he returned to Austria, when criminal proceedings for illegal emigration were instituted against him. He thereupon claimed the protection of the United States, but interference on his behalf was declined, on the ground that, inasmuch as he had once been subject to the laws of Austria and had whilst so subject violated those laws, his withdrawal from his native jurisdiction and proposed acquisition of a different national character would not exempt him from their operation, whenever he again chose to place himself under them.

Opinion.] Mr. Marcy, in his despatch to the United States Ambassador at Vienna, admitted that every State, when its laws were violated by anyone owing obedience to them, whether a citizen or a stranger, had a right to punish the transgressor when found within its jurisdiction, and that the case was not altered by the character of the laws unless they were in derogation of the well established International code. No nation had a right to supervise the municipal code of another nation, or to claim that its citizens or subjects should be exempted from the operation of its code, if they had voluntarily placed themselves under it. The character of the municipal laws of one country did not furnish a just ground for other States to interfere with the execution of those laws, even when they took effect upon their own citizens, if they had gone into that country and subjected themselves to its jurisdiction.

Case of Simon Tousig: Wheaton's International Law
by Lawrence, App. 929.

The difference between the attitude of the United States in the present case and in that of Martin Koszta, appears to have arisen from the fact of the return to Austrian jurisdiction in Tousig's case having been voluntary, while in the case of Martin Koszta there

had been a compulsory seizure by the Austrian authorities within the territory of another State. The doctrine affirmed by Mr. Marcy has since undergone considerable modification so far as the municipal regulations of the United States are concerned (*r*), but the principle laid down may still be said to represent the true International rule on the subject (*s*).

Naturalization implies the renunciation of one political status and the adoption of another. It involves two questions: (1) How far will it be recognized by the parent State as exempting the party naturalized, from the consequences of his earlier allegiance? In other words, How far is there a right of expatriation? (2) Under what conditions will it be granted by the State to which the alien seeks to affiliate himself?

In regard to the first question, many States formerly refused to allow their subjects to cast off their previous allegiance. The maxim of the English Common Law, "*Nemo potest exuere patriam*," precluded a natural-born subject from adopting a new political status, and rendered him liable to the penalties of treason if found in arms against his native country. Thus, in the case of *Aeneas Macdonald* (18 How, St. Tr. 858) it was held that a natural-born British subject could not shake off his allegiance and transfer it to a foreign prince, and that a foreign prince could not by naturalizing or employing a British subject dissolve his allegiance to the British Crown. This principle was formally abandoned by the Naturalization Act, 1870 (*t*). This Act provides (1) that any natural-born British subject who, whilst in a foreign State and not under any disability, shall voluntarily become naturalized in such State, shall be deemed as from that time to have ceased to be a British subject; and (2) that any person who is a British subject by reason of his having been born in British territory, but who at the time of his birth also became and still remains by the law of any foreign State a subject of that State, may, if of full age and not under any disability, make a declaration of alienage as prescribed by the Act, and shall thereafter cease to be a British subject. Provision is also made for enabling aliens naturalized in Great Britain to divest themselves of such status, in certain cases, by a declaration of alienage; and for the readmission, under certain conditions, of British subjects who have been naturalised elsewhere, to British nationality; moreover, where the father, or the mother being a widow, obtains a certificate of such readmission, this is to extend to any child who during infancy becomes resident in British territory with its parent. In *Re Trufort* (L. R. 36 Ch. D. 600) it was held that where a natural-born British subject had gone to

(*r*) See p. 93, *infra*.

(*s*) See p. 94, *infra*.

(*t*) See 33 & 34 Vict. c. 102, 1870, ss. 3, 4 and 6.

reside in Switzerland and had acquired the "indigenat" in Zurich, he must be deemed, despite the fact that it was at the time permissible to acquire this under Swiss law without forfeiting his former nationality, to have relinquished his English character and to have become a Swiss subject, under sect. 6 of the Naturalization Act, 1870 (*u*). In *Re Bourgeoise* (L. R. 41 Ch. D. 310) it was held that where a Frenchman had in 1871 obtained a certificate of naturalization in England without, however, previously obtaining the necessary authorization required by French law, and had subsequently in 1880 returned to France, where he continued to live till his death, his nationality and domicile must be regarded as French. By a treaty entered into in the same year, between Great Britain and the United States, it was provided that British subjects becoming naturalized in the United States should be treated in all respects as United States citizens; and a corresponding provision was made with respect to United States citizens becoming naturalized in British dominions.

The United States also appear originally to have refused to recognize a right of expatriation on the part of their own subjects, and further to have been unwilling to enforce a recognition of this right by foreign States in respect to their subjects who had been naturalized in the United States but had subsequently returned to their country of origin. The latter question was naturally one of more frequent occurrence than the former.

In the case of Ignaco Tolen, a Spaniard who had been naturalized in the United States, Mr. Secretary Webster, in a despatch dated 25th June, 1852, stated that if the Spanish Government recognized the rights of its subjects to denationalize themselves and assimilate themselves with other countries, the usual passport would be a sufficient guard; but if the law of Spain did not permit them to renounce this allegiance, they must expect to be liable to the obligations of Spanish subjects, whenever they placed themselves under the jurisdiction of the Spanish Government. Again, in 1853 the American minister at Berlin was instructed that although the Naturalization laws in the United States assumed that a person could by his own acts divest himself of allegiance to the government of the country where he was born, and contract a new allegiance to another State, yet if a native Prussian naturalized in the United States returned to Prussia, the United States could not protect him from the Prussian laws. Mr. Marcy's opinion in *Tousig's case* in 1854, was to the same effect. In 1859, however, the American view appears to have changed. In that year a similar question arose between the United States and the Prussian Governments, and it was then laid down by the United

States that if a native Prussian became naturalized in their territory, his allegiance to his native country would be severed for ever, and should he return to his native country, he would do so as an American citizen and in no other character. In 1868 an Act of Congress was passed, declaring that the right of expatriation was an inherent right of all people, and enacting that all naturalized citizens of the United States should, when in a foreign country, be entitled to receive from their Government protection similar to that accorded to native-born subjects in the like circumstances. With regard, therefore, to foreign subjects who have become naturalized in the United States, the Act of Congress seems explicit in according them the full rights and protection of United States citizens. It appears, nevertheless, that if a foreign subject were to become naturalized in the United States, but had left military duty unperformed in his native country, he might lawfully be held to it if he returned there, though he would not be liable for any duty accruing subsequent to his naturalization (u).

In regard to United States citizens who desire to expatriate themselves, if such persons should become naturalized in another country, the Act of 1868 would undoubtedly require the United States authorities to recognize this; but the Act is not clear as to what steps short of this will constitute expatriation. From the instructions issued to the United States minister in France in 1873, we may conclude that if an American citizen were to withdraw himself, his family and property, permanently from United States territory, this would be regarded as an act of expatriation (x).

According to French law, a Frenchman loses his nationality (1) by naturalisation in a foreign country, (2) by accepting office under a foreign government without the permission of his own government, (3) by establishing himself abroad without the intention of returning to France. Provision, however, is made for re-admission to French nationality under certain conditions. A Frenchman who emigrates in fraud of military service becomes liable to penalties on his returning to France within a certain period (y).

By the law of Germany and Austria emigration without the consent of the authorities is not permitted, but if such consent is obtained and the party emigrates without any *animus revertendi* he loses his nationality. Emigration in fraud of military service renders the offender liable to penalties in addition to the continuing obligation to perform the service (z).

Such is a short summary of the practice of different States on the subject of expatriation. It is still contended, however, by many writers on International Law that there is no such right, and that

(u) See Wharton, §§ 181, 182.

(x) See Wheaton, by Boyd, p. 240.

(y) See Wheaton, by Boyd, pp. 234,

235.

(z) See p. 96, *infra*.

the subject of one State cannot contract a new allegiance without his native country's consent (*a*). But there can be no doubt that the fast changing conditions of modern political life, and the exigencies of modern trade and commerce, will tend sooner or later to force an acceptance of this principle on International Law; though it may fairly be held to be subject to a continuing liability for non-extraditable offences previously committed, in cases where such liability is not got rid of by prescription.

As to the conditions on which Naturalization will be allowed by the State to which the applicant seeks to affiliate himself, these vary in different countries. This is strictly a matter of municipal regulation and not of International Law. Roughly, however, these conditions are as follows:—According to the law of Great Britain, any foreigner who has resided in the United Kingdom for five years, or has for that period held service under the Crown, and intends to continue such residence or service, can, on furnishing the necessary evidence to this effect, obtain a certificate of naturalization from one of the principal Secretaries of State, and he will then, after taking the oath of allegiance, be considered a British subject for all purposes, except that when in his country of origin he is not to be so considered, unless he has ceased to be a subject of that country, either in accordance with its laws or under treaty. By sect. 10 of the Naturalization Act, it is provided that a woman shall be deemed a subject of the State to which her husband is for the time being a subject. The results of naturalization extend to children under age and resident with their father and mother within the United Kingdom. In the United States a foreigner must make a declaration on oath of his intention to become naturalized; after the lapse of two years from the date of this declaration and after five years' residence in the United States, and subject to the further condition of taking an oath of fidelity to the constitution and renouncing any foreign title of nobility, he becomes a United States citizen. In France a foreigner of full age who has obtained permission to become domiciled in France, is entitled to letters of declaration of naturalization after three years' residence. In Germany, naturalization can only be conferred by the high administrative authorities; the applicant must show that he is at liberty, under the laws of his native country, to change his nationality, or, if he is a minor, that his father or guardian has given him the requisite permission, that he is leading a respectable life, that he is domiciled in Germany, and that he has the means of livelihood (*b*).

(*a*) See the case of *Alibert*, *infra* p. 96.

(*b*) A more complete account of the

conditions upon which naturalization depends in different States will be found in Hall, Appendix III. p. 759.

CASE OF LUCIEN ALIBERT.*Temp.* 1852.

[U. S. SENATE DOCUMENTS, 1859—60, VOL. II., p. 176.]

Case.] Lucien Alibert, a natural born French subject, went to the United States of America when about eighteen years of age, and before he had rendered the military service prescribed by French law. He was duly naturalized in that country, but subsequently returned to France, where he was arrested as an *insoumis*. He pleaded his naturalization in America, but was convicted. Subsequently, however, the sentence passed on him was remitted, on the ground that more than three years had elapsed between the time when he was naturalized and the date of his return to France.

Case of Lucien Alibert: U. S. Senate Documents, 1859—60, Vol. II., p. 176.

In countries where military service is compulsory, naturalization in fraud of this is either prohibited, or renders the offender liable to imprisonment if he returns, and to the forfeiture of all property subsequently acquired in his native country. By the law of France, every Frenchman is subject to the obligation of military service, and if he emigrates without having served his time in the army, he is liable to a penalty. An *insoumis*, or person who fails to join his standard when called upon, ceases to be liable to the conscription on acquiring a foreign nationality, although he still remains subject to the penalty for evading the military law. If he remains abroad for three years after naturalization, his offence becomes purged by prescription, and he may return to France free from liability. By the military law now in force throughout the German Empire, every German subject is liable to military service, which cannot be performed by deputy. The right to emigrate is limited by this obligation. Permission to emigrate is not to be granted to males between the ages of seventeen and twenty-five without a certificate from the military commission of the district in which the applicant resides, nor is it to be granted to soldiers or officers before their discharge, or to persons conscribed for military service (c). By the Penal Code, any one emigrating without permission, in order to avoid military service, is liable to fine and imprisonment, and remains, notwithstanding, liable to perform military service, if he returns.

(c) See Wheaton, by Boyd, p. 243.

MACKETT'S CASE.*Temp. 1863.*

[HALLECK'S INTERNATIONAL LAW, VOL. I., p. 375.]

Case.] In 1863 Mr. Mackett, a natural-born British subject, then resident in the United States, was arrested. He had not been naturalized, and he applied for redress to the British Government. It appeared that he had, while in the United States, voted at elections, and on this ground the British Government declined to interfere.

Case of Mr. Mackett: Halleck's International Law, Vol. I., p. 375.

Aliens whilst domiciled in a foreign country retain their national character unless they become naturalized, although their civil rights and duties are regulated by the law of their domicile. By the Comity of Nations they are usually allowed to come and go freely and also to reside in the country, although sometimes registration and liberty of domicile are required. In some countries, however, such as the United States and some of the British Colonies, severe restrictions are imposed upon the immigration of Chinese, and also of pauper immigrants. Aliens are also allowed to intermarry, to enter into contracts and to have recourse to the courts of the country for their enforcement, subject, however, to security for costs being required from such as are non-resident. They are also allowed to hold personal property, and in many States real property also. Some States, however, impose restrictions on their acquisition of real property. This was formerly the case in Great Britain and is still the case in some of the United States and in the Federal Territories. Aliens are usually excluded from the exercise of public rights. In Great Britain, under the Naturalization Acts, aliens are at liberty to acquire, hold, and dispose of both real and personal property, and also to exercise other rights, with the exception of public rights such as holding office or the exercise of any franchise, and the right of being registered as owners of British vessels (*d*). On the other hand, aliens whilst resident in a foreign country owe a temporary allegiance to its laws, and though still entitled to the protection of

(*d*) See Naturalisation Act, 1870, 33 & 34 Vict. c. 102.

their own country, they cannot complain if they suffer only in common with the other inhabitants of the country.

During the American civil war, a question arose as to the liability of aliens resident in the United States to serve in the army of that country. Lord Lyons, the British Ambassador accredited to the United States, was instructed that while there was no rule or principle of International Law which prohibited the Government of any country from requiring aliens resident within its territory to serve in the militia or police of the country, or to contribute to the support of such establishments, yet the British Government would refuse to consent to British subjects being compelled to serve in the armies of either party, where besides the ordinary incidents of battle they would be exposed to be treated as traitors or rebels in a quarrel in which as aliens they had no concern; it therefore required that all who could prove their British nationality should be exempted; but it refused to interfere on behalf of British subjects who had been completely naturalized, or on behalf of those who, like Mackett, had voted at elections or who had in any other way claimed or exercised the privileges of United States citizenship. At a later stage of the war the conscription was extended to persons who had declared their intention of becoming naturalized but had not completed the necessary conditions; but inasmuch as an alternative was given to such persons of exempting themselves from this obligation by quitting the country within sixty-five days, Great Britain refused to interfere on their behalf (e).

The more reasonable rules, according to Bluntschli, are:—(1.) Aliens are not obliged, without their own consent, to serve in a force intended for ordinary national or political objects; (2.) They are obliged to help to maintain social order where the action required of them is kept within the bounds of police, as distinguished from political action; (3.) They may be compelled to defend the country when it is threatened by an invasion of savages or uncivilized nations (f).

(e) Parl. Papers, North America, by Boyd, p. 242.
No. 13, 1834, p. 34, and Wheaton, (f) See Bluntschli, § 391.

*DOMICILE—CIVIL STATUS.***THE "INDIAN CHIEF."***Temp.* 1800.

[3 C. ROB. 12.]

Case.] In 1795, during war between Great Britain and Holland, the "Indian Chief," a vessel belonging to one Johnson, sailed from London to Madeira, and thence to Madras, Tranquebar and Batavia. On the return voyage the master put into Cowes for the purpose of receiving orders respecting a cargo taken in at Batavia. Here the ship was arrested on the ground that she was the property of a British subject and had been engaged in an illegal trade with the enemy. It appeared that Johnson had been born in America before the War of Independence, that he then came to reside in England, and had engaged in commerce there between 1785 and 1797. During this time the Court considered that he had undoubtedly acquired an English domicile, and had become subject to English municipal law. It appeared, however, that in 1797, before the capture of the vessel, he had left this country and returned to the United States. The Court, in view of this fact, held that his character as an American citizen had reverted, and that the vessel was consequently not liable to condemnation.

Judgment.] Sir W. Scott (*g*) in giving judgment stated that if a person went to another country and engaged in trade and resided there, he was by the Law of Nations to be considered as a merchant of that country. But as Mr. Johnson's character as a British merchant was founded on residence only, it must be held that from the moment he turned his back on the country where he had resided, he was in the act of resuming his original character, and was to be considered as an American citizen. The character that was gained by residence ceased

(*g*) Afterwards Lord Stowell; but it has been thought better in this and subsequent cases to retain the style borne

by the learned Judge at the time of the report.

with residence. It was an adventitious character which no longer adhered to him from the moment that he put himself in motion *bond fide* to quit the country *sine animo revertendi*.

A question arose in the same case as to the liability of the cargo and the nationality of its owner. It appeared that the latter had acted as American Consul at Calcutta, and had engaged in trade there. After some discussion as to the British authority in India, it was pointed out in the judgment that as the credentials of the Consuls were addressed to the British Government, and not to the Mogul, he must be considered as a British merchant, and that his property, having been taken in trade with the enemy, must be held liable to confiscation.

The Indian Chief, 3 C. Rob. 12.

In addition to a man's political *status*, by which he becomes a member of some particular State whether he resides in that State or not, International Law recognizes also a civil *status*, by which a man becomes invested with certain municipal rights and duties. The latter character is determined by his domicile. This question of domicile, as Lord Hatherley observed in the case of *Udny v. Udny* (L. R. 1 Sc. App. 441), is quite distinct from that of allegiance. A man may continue to be an Englishman, and yet his contracts and the succession to his property may have to be determined by the law of some other country in which he has chosen to settle. Thus, a person who is a natural born British subject might become domiciled in the United States and yet, in default of being naturalized there, he would retain his old allegiance and his character as a British subject. Or, to go a step further, such person might become naturalized in the United States, and yet subsequently determine his domicile there by taking up his residence in some other country. Here he would strictly retain his political *status* as a United States citizen (*gg*), whilst his other jural relations would be determined by the law of his new domicile, or if no new domicile were acquired, then by the law of his domicile of origin. In the case of *King v. Foxwell* (L. R. 3 Ch. D. 518), Jessel, M.R., held in circumstances similar to the above that the English domicile of origin reverted; and although no opinion was pronounced on the question as to how far the testator retained his political

(*gg*) Although, from the instructions issued to the United States minister in France in 1873, it would seem that, from the point of view of the United

States Executive, the permanent withdrawal of a citizen from that country would have the effect of determining his political status; see p. 94, *supra*.

status as a United States citizen, yet inasmuch as it appeared that he had taken no steps to obtain readmission to British nationality under the Naturalization Act, 1870 (*h*), it would seem that he retained his American nationality, whilst recovering his English domicile of origin.

It is the law of domicile which regulates such questions as legitimacy, minority, capacity to contract, and capacity to hold property. Such matters fall within the domain of private International Law, or the Comity of Nations. In public International Law the question of domicile is mainly important as determining enemy-character in time of war, and the consequent liability of ships and property captured at sea.

Domicile has been defined as a man's principal place of residence. It is the place where he has his home, "the centre of his jural relations" (*hh*). Every man is presumed to have some domicile; until he is *sui juris*, he is presumed to have the domicile of his father if legitimate, or of his mother if illegitimate; but if the paternity of an illegitimate child is fixed, the father's domicile will attach to him. This is commonly called domicile of origin, and is usually identical with the country from which he derives his national character—that is, *domicilium* with *patria*. When a man becomes *sui juris*, it is competent to him to select another domicile. For this it is necessary that he should voluntarily abandon his domicile of origin and take up a new residence in some other country, with intent to remain there for an unlimited time. Such choice of residence must be free and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or relief from illness; and the residence must not be for a limited or particular purpose, but general and indefinite in its future contemplation. This will constitute a new domicile, which so long as residence continues will have the effect of suspending the operation of the party's earlier domicile, and the law of such new domicile will determine the character of his civil rights and duties for the time being.

A domicile of origin may be extinguished by act of law, as for example, by sentence of death or exile for life; but it cannot be extinguished, although it may be suspended, by the will and act of the party. Domicile of choice, as it is gained *animo et facto*, may, in like fashion, be put an end to *animo et facto*. Should the domicile of choice be unequivocally abandoned without a new domicile being acquired, the law of the domicile of origin will revive, and will continue to govern the civil relations of the party in question, until a new domicile is fixed on (*i*). A natural-born Englishman will, if he

(*h*) 33 & 34 Vict. c. 102.

(*hh*) See Savigny, VIII., 58.

(*i*) This, though settled by the cases, is very doubtful as a principle, for logically the domicile which a man has voluntarily chosen should be preferred

to a domicile that he has only by operation of law. The preference shown in the cases for the latter seems to be a survival of the old confusion between nationality and domicile.

becomes domiciled in Holland, acquire the civil *status* of a Dutch resident; but if he breaks up his establishment and quits Holland and goes to travel in France or some other country without, however, taking up any permanent residence there, his jural relations will then be governed by the law of England, that being his domicile of origin; and this will continue to be so until he acquires a new domicile of choice (*j*).

With respect to the evidence necessary to establish a new domicile it is impossible to lay down any rule. Courts of justice must necessarily draw their own conclusions from all the circumstances of each particular case, and every case must vary in its circumstances. The two main factors will be intention and residence. More will depend on the nature and character of the residence than on its length. If the intention is manifest, residence for a comparatively brief period will suffice (*k*). There is, however, a strong presumption against an American or European acquiring a domicile in a community with political, social, and religious ideas in radical conflict with those of Christian communities; hence it is generally held that a residence in a foreign State as a privileged member of an extra-territorial community, although it may be effectual to extinguish a domicile of choice, will yet not be effectual to create a new domicile (*l*).

With regard to ~~enemy-character~~ in time of war, it should be observed that an individual is not tied down to the domicile in which he is found at the beginning of a war. So soon as he actually removes elsewhere, or takes steps to effect a removal, in good faith and without intention to return, he severs his connection with his original domicile. But such change, on outbreak of war, is scrutinized very closely. In case of capture, the onus of proof will be on the party asserting such new domicile. Less cogent proof, however, will be required where the change is from an acquired domicile to domicile of origin, than when this is reversed (*m*).

THE "PORTLAND."

Temp. 1800.

[3 C. ROB. 41.]

Case.] During war between Great Britain and France, at the close of the last century, the "Portland" was seized on the ground that the owner of part of the cargo was an enemy-

(*j*) See judgment of Lord Westbury in *Udny v. Udny*, L. R. 1 Sc. App. 441.

(*k*) See Nelson, pp. 15 to 33.

(*l*) See *Tootal's Trusts*, L. R. 23 Ch. Div. 532, and Wheaton, by Boyd, p. 237.

(*m*) See p. 185, *infra*.

subject. It appeared that Mr. Ostermyer, the person in question, was a German who had a house of business at Ostend, which was within the enemy's territory, and also a house at Hamburg, which was not within it. The transaction being connected with the Hamburg house, it was held that the cargo was not liable to condemnation.

Judgment.] Sir W. Scott, in giving judgment, stated that the consequence of Mr. Ostermyer's being engaged in trade in Ostend could not be extended to the trade which he was carrying on at Hamburg, which was unconnected with the Ostend trade. In the present case there was a neutral residence; the nature of the transaction and the destination were perfectly neutral. The fact of Mr. Ostermyer's trading to Ostend could not affect his commerce in other parts of the world, unless it could be said that trading in an enemy's commerce made him as to all his concerns an enemy, or that being engaged in a house of trade in the enemy's country would give an enemy-character to all his transactions. But there was no case or principle to support such a proposition. The consequence of his having connection at Ostend must be limited to his Ostend trade, and his other trade must be exonerated.

The Portland, 3 C. Rob. 41.

A person, though not resident in a country, may be so associated with it, through having or being a partner in a house of trade there, as to be imbued with an enemy-character in respect of property connected with that trade. This is called commercial domicile. According to the practice of England and the United States, this rule is not affected by the fact of the person in question acting as consul (*mm*). An illustration of this liability in virtue of commercial domicile is afforded by the case of the *Jonge Klassina* (5 C. Rob. 297). In this case it appeared that, during war between Great Britain and Holland, one Ravie had imported goods from Holland under a licence accorded to him by the British Government, the licence being confined to the import of goods belonging to him (presumably as a Birmingham merchant). It appeared, however, that Ravie had also

(*mm*) See the case of the *Indian Chief*, p. 100, *supra*

a house of business at Amsterdam, and was the exporter from Holland as well as the importer into England. It was laid down in the judgment that, if a man had mercantile concerns in two countries, and acted as a merchant of both, he must be considered as a subject of both, with regard to the transactions originating respectively in those countries; and it was therefore held that the licence would not protect the transaction so far as regarded the exportation by Ravie of goods from Amsterdam, which belonged to him as a Dutch merchant, and confiscation of these goods was decreed.

But while, on the one hand, domicile in a belligerent country will carry with it these liabilities; on the other hand, domicile in a neutral country, even on the part of a natural-born subject of either belligerent, will not only exempt his property from capture as enemy-property by the other, but will also entitle him to carry on trade with that other without incurring any liability towards his native country on the ground of trading with the enemy. Thus in the case of the *Danous* (cited 4 C. Rob. 255), a British subject domiciled in Portugal, was allowed the benefit of the Portuguese character so far as to protect a trade carried on by him with Holland, although the latter Power was then at war with Great Britain.

In default of naturalization, however, it is not permitted to a natural-born subject to engage in war against his native country.

AMBASSADORS—STATE AGENTS.

LESLEY, BISHOP OF ROSS.

Temp. 1671.

[SOMERS' TRACTS, 2ND EDITION, BY SCOTT, VOL. I., p. 186.]

Case.] In the reign of Elizabeth, John Lesley, Bishop of Ross, was concerned with others in furthering a scheme for the marriage of Mary Queen of Scots with the Duke of Norfolk. He also engaged in other enterprises for Mary's relief. He was thereupon imprisoned by the English Government, but was subsequently liberated on condition of his leaving the kingdom.

Opinion.] The Bishop of Ross having claimed privilege as Mary's ambassador, notwithstanding that Mary was a prisoner in England, the Crown lawyers were consulted as to this

contention, and expressed the following opinion:—1st, that an ambassador that raises rebellion against the prince to whom he is sent has forfeited the privileges of an ambassador as such, and is liable to punishment; 2ndly, that the agent of a prince, deposed from public authority, and in whose stead another is substituted, cannot challenge the privileges of an ambassador; 3rdly, that if a prince comes into another's kingdom and is imprisoned there, he may have an agent if he has not forfeited his principality, but whether that agent be reputed an ambassador depends upon the authority of his commission; 4thly, that a prince may forbid entrance into his kingdom to such an agent, and may command him to leave the kingdom if he do not keep himself within the bounds prescribed to ambassadors, but the agent may, in the meantime, enjoy the privileges of an ambassador, according to the authority deputed to him.

Lesley, Bishop of Ross: Somers' Tracts, 2nd Edition
by Scott, Vol. I., p. 186.

This case is cited as showing the attitude of the English lawyers towards ambassadorial privilege at the end of the sixteenth century. It would seem that at Common Law ambassadors were originally held liable for offences committed against the Sovereign to whom they were accredited. Later cases, however, show that the English practice on this subject tended to come more into harmony with International Law. Thus, in the same reign, Mendoza, the Spanish ambassador, having taken part in a conspiracy, the object of which was to dethrone the Queen, was arrested by order of the English Government. A question having been raised as to whether he was amenable to English jurisdiction, an opinion was given by Albericus Gentilis and Francis Hotman to the effect that an ambassador, who had been concerned in a conspiracy against the Sovereign to whom he was accredited, could not be put to death, but must be remanded to his own Sovereign for punishment. In accordance with this opinion, Mendoza was sent out of the country (*n*).

The privileges of an ambassador or a diplomatic agent at International Law are commonly grouped under two heads, inviolability of person and extraterritoriality.

(*n*) See Camden, Vol. II., p. 497.

His inviolability is said to be founded on the Law of Nature (*jus gentium primum*), and his privilege of extritoriality upon usage and implied consent (*jus gentium secundarium*); but in modern times no line of demarcation can really be drawn between the two, except, possibly, as to third Powers, through whose territories an ambassador may happen to be passing (*o*). In the latter case, the rules appear to be (1) that in time of peace an ambassador is inviolable during his transit through a third country, but he cannot claim the privilege of extritoriality as a matter of right, although this would now probably be accorded to him as a matter of comity; (2) that in time of war between the State which he represents and the State through whose territories he is passing, he cannot claim inviolability as of right, without having previously obtained permission to pass through the territory of the hostile State, though this would probably be granted in the event of his being accredited to a neutral State (*p*). The question is not now, however, one of much importance (*q*).

In regard to the State to which he is accredited, an ambassador's privileges may conveniently be grouped under the attribute of extritoriality or extra-territoriality, in virtue of which, his residence within such State is considered as a continuing residence in his own country. His privilege commences from the moment he sets foot in the State to which he is accredited, if previous notice of his mission has been imparted; or in any case, as soon as he has made his public character known by the production either of his passport or his credentials. The privilege continues during the whole time of his sojourn and his departure. It is not affected by the outbreak of war; in this case the ambassador is entitled to his passports and to a safe conduct across the frontier. The privilege avails not only ambassadors proper but all classes of ministers who represent their State, and attaches also to all who really belong to the suite or household of the ambassador (*r*).

It is in virtue of, or more accurately, under cover of this attribute that an ambassador is, in general, exempt both from the criminal and civil jurisdiction of the country to which he is accredited (*s*).

With respect to criminal offences, under ordinary circumstances, the State to which the ambassador is accredited has no jurisdiction either to try or punish offences committed by him. Nor is he under any circumstances subject to arrest under the ordinary process of the courts. In 1763 the ambassador of Holland at the Court of

(*o*) But see Halleck, Ch. IV., pp. 13, 300. *Trent*, p. 327, *infra*.

(*r*) But see p. 115, *infra*.

(*p*) See Phillimore, II., 217.

(*s*) But see *Gyllenbourg's Case*, p. 108.

(*q*) See, however, the case of *The*

the Landgrave of Heese-Cassel was arrested for refusing to render an account relating to a testamentary trust which he was alleged to have mal-administered, but the Landgrave was subsequently compelled to make both apology and reparation for the arrest. If an ambassador should commit a crime, the State to which he is accredited might rightly signify its displeasure according to the gravity of the offence, and either demand his recall, or even require him to leave at once, without previous communication with his Government. The case of offences against the State itself will be dealt with hereafter; but even as to these it now seems clear that no judicial process could be put in force against him, although in cases of emergency he might be arrested and forcibly expelled.

With respect to civil jurisdiction, the matter is not quite so clear. It is admitted, indeed, that the local jurisdiction cannot be exercised in such manner as to interfere, however remotely, with his freedom of person, or with the property belonging to him in his official character. So far as his official character and position are concerned, there is in general a complete recognition of the privilege of extritoriality. But as regards property held by him in his private character, it would seem that the local Courts are competent to exercise jurisdiction to the same degree as in the case of a foreign Sovereign (*i*). An ambassador must also comply with such administrative and police regulations as are necessary for the safety or health of the community. Outside these limits the practice of different States is not altogether uniform. The English law on the subject will be dealt with hereafter. The practice of other nations, however, appears to favour the view, now generally entertained, that an ambassador is not, outside the limits indicated above, amenable to local jurisdiction except by consent (*ii*). His personal effects are not liable to taxation, although he is liable to the payment of tolls and postages. Goods imported by him for his personal use are free from duty. His house or hotel is inviolable and cannot generally be entered by the police or by other officers; but it must not be converted into an asylum for fugitives from justice. An ambassador's immunities usually extend to members of his family living with him, and to members of his suite, over whom in subordinate matters he is at liberty to exercise a limited amount of jurisdiction. The common practice also seems to be, to extend the ambassador's privilege to messengers and couriers passing with despatches between the ambassador and his own country or other legations, subject to their being provided with the requisite passports and evidence of their official character.

Such is a general view of ambassadorial privilege, the more

(i) See p. 84, *supra*.

(ii) See Hall, pp. 170, 174.

precise limits of which will appear from the cases subsequently cited.

Before passing to these, it may not, perhaps, be out of place to mention that, under the regulations of the Congress of Vienna, 1815, and Aix-la-Chapelle, 1818, four classes of diplomatic agents are recognized (*u*). These, in the usual order of precedence, are :— (1) Ambassadors, papal legates, and nuncios ; (2) Envoys and ministers plenipotentiary accredited to the Sovereign ; (3) Ministers resident accredited to the Sovereign ; (4) *Chargés d'Affaires* accredited to the Minister for Foreign Affairs. Ministers from different countries, included in the same class, take precedence in the order of the date of the notification of their arrival ; family ties and ties of alliance between the Sovereigns give no ground of precedence. With reference to papal legates, Roman Catholic Powers formerly gave them precedence, but other Powers did not conform to this practice. Sometimes ministers of the second order have precedence given to them as a matter of courtesy. All these classes of diplomatic agents are entitled to the immunities above described.

GYLLENBOURG'S CASE.

Temp. 1717.

[*DE MARTENS, CAUSES CÉLÈBRES, VOL. I., p. 97.*]

Case.] In 1717, Count Gyllenbourg, the Swedish Ambassador to England, was ascertained to be engaged in a plot against the Hanoverian dynasty. He was arrested by order of the English Government, his despatches seized, and his cabinet broken open. Instead of being immediately sent from the kingdom, he was detained here for a time, the detention being partly due to the fact that similar measures had been adopted by the Swedish Government towards the English Minister in Sweden. Some dissatisfaction at the arrest was at first expressed by other ambassadors accredited to England, but these expressions were subsequently withdrawn, when the facts of the case were known, the Secretary of State having pointed

(*u*) The terms of the *régez* of the Congress of Vienna, and that of the Congress of Aix-la-Chapelle, will be

found in Wheaton, by Boyd, p. 318, in *notis*.

out that what had been done was necessary for the peace of the kingdom. In consequence of the mediation of other Powers, both ambassadors were subsequently released.

Gyllenbourg's Case: De Martens, Causes Célèbres, Vol. I., p. 97.

Although an ambassador's privilege exempts him from criminal jurisdiction, yet if he should engage in acts dangerous to the safety of the State to which he is accredited, his arrest and imprisonment are clearly warranted as measures of self-defence. In 1718 occurred the case of the Prince of Cellamare, who was accredited by the Court of Spain to that of France. With the connivance of his own Government he organized a conspiracy against the French Government. This fact having been discovered, the French Government caused the Prince to be arrested and his papers seized. He was kept in custody for some time and then conducted under military escort across the frontier. War soon afterwards broke out between the two countries, but none of the other ambassadors then resident in Paris appear to have complained of the action of the French Government, although such a course is usual when there has been any unwarrantable infringement of ambassadorial privilege (x).

Akin to this class of cases, although differing in degree, are cases where ambassadors engage in acts that are unfriendly to the State to which they are sent, or intermeddle in local disputes. In 1848, Sir H. Bulwer, the British Ambassador to Spain, was believed by the Spanish Government to have lent his assistance to the disaffected subjects of that Government. His passports were thereupon handed him, and he was requested to leave Spanish territory. This led to the suspension of diplomatic relations between the two countries for some time, the dispute being only settled by the mediation of the King of the Belgians (y). In September, 1888, on the eve of the Presidential election in the United States, Lord Sackville, the British Ambassador, was tricked by means of a fictitious letter into offering suggestions to his correspondent as to how the franchise should be exercised. He also had interviews with certain newspaper reporters on the subject, reports of which were made public. Thereupon the United States Government requested his recall, and almost immediately afterwards sent him his passports. Some correspondence ensued on the subject between the two Governments. Lord Salisbury requested that copies of the newspapers in which such

(x) See Phillimore, II., 214.

(y) See Wheaton, by Boyd, p. 336.

reports were published, should be forwarded to him. These were sent; but the United States Foreign Secretary at the same time intimated his view that a request for the withdrawal of an ambassador was sufficient, irrespective of the motives inspiring it, and that the retention of such a minister was solely a matter for the Government to which he was accredited, which might assign reasons or not, as it chose. Lord Salisbury, in reply, pointed out that although one Government was at liberty to demand the recall of or to dismiss the ambassador of another Government, it could scarcely expect the latter to lend itself to, or concur in such a proceeding, unless it was satisfied of the justice of the demand for recall (2). In view of the discourteous action of the United States Government, some time was allowed to elapse before a fresh ambassador was accredited to Washington by Great Britain.

CASE OF THE CZAR'S AMBASSADOR.

Temp. 1708.

[PHILLIMORE'S INTERNATIONAL LAW, VOL. II., p. 228.]

In 1708, the ambassador of the Czar Peter the Great, who had been accredited to the Court of St. James', was arrested in London for a debt of £50. Instead of applying for a discharge on the ground of privilege, he gave bail in the action, but on the following day complained to the Queen. Those who were concerned in the arrest were then examined before the Privy Council, and thereupon committed to prison and prosecuted by information in the Court of Queen's Bench at the suit of the Attorney-General. At the trial the question of law was reserved for argument before the Judges, but was never determined. Meanwhile, to mitigate the indignation of the Czar, the Government of the day caused an Act to be passed precluding such proceedings in the future.

Case of the Czar's Ambassador: Phillimore's International Law, Vol. II., p. 228.

With reference to the liability of an ambassador to civil process, Coke, the only authority as to the earlier law on this subject, lays

(2) See Parl. Papers, Nos. 3 and 4 1888, United States.

down that ambassadors are liable in civil cases on contracts *jure gentium*; but even if the ambassador was at Common Law liable to civil jurisdiction, it does not follow that he was liable to arrest. Any doubt on this subject, however, was set at rest by stat. 7 Anne, c. 12, which may be considered as having brought the English Law into harmony with the Law of Nations. By this statute, all proceedings for the arrest and imprisonment of a foreign ambassador or minister, or his domestic servant, or for the seizure of the goods or chattels of any such person, are rendered illegal and void; by section 5, however, no merchant or trader within the meaning of the Bankruptcy Laws, in the service of an ambassador or minister, is to have the benefit of the Act, and no person is to be liable to the penalties imposed by the Act for arresting any servant of an ambassador or foreign minister, unless the name of such servant is registered in the office of one of the principal Secretaries of State, as provided by the Act. With regard to the interpretation of this clause, it was held by Lord Mansfield in *Triquet v. Bath* (8 Burr. 1478), that proof of actual *bona fide* service was enough to secure exemption, and that the fact of a defendant having previously been a trader in Ireland, would not bring him within the exception set up by the 5th section of the Act.

In 1890, the Congress of the United States of America passed a statute containing provisions very similar to those of the statute of Anne, and the decisions of the United States Courts on this subject are to a great extent in accordance with those of Great Britain (a).

Passing from English Law to the Law of Nations on this subject, it would seem that, according to the generally accepted rules, an ambassador is not liable to any form of civil execution. In an important case mentioned by Wheaton (i), the United States ambassador at Berlin had rented a house from a Prussian subject; a question subsequently arose, as to whether a lien for rent and damage could be enforced against the goods of the ambassador left in the house, this lien being annexed to the contract of tenancy by the Prussian Civil Code. Prussia contended that the right of detention was a part of the contract, attached to it by the Prussian Civil Code, and that the ambassador by entering into the contract had resigned an immunity which he otherwise might have claimed. The United States replied that, if this principle were true, it might be contended that an ambassador rendered himself liable to arrest by accepting a bill of exchange. The goods were ultimately restored on payment being made for the damage done. Prussia, however, propounded the question, whether an ambassador who gave goods in pledge could recover

(a) See the case of *United States v. Hand*, 2 Nash. C. C. Rep. 435, and

Dupont v. Pichon, 4 Dall. 321.
(b) Wheaton, by Boyd, p. 287.

them merely on the ground of privilege. The United States in their reply distinguished between an express pledge, where it was admitted that he could not recover the property, and an implied pledge given by the municipal law of the country, by which an ambassador would not be bound (c).

TAYLOR v. BEST AND OTHERS.

Temp. 1854.

[14 COM. BENCH, 487.]

Case.] This action was brought against certain persons, upon a contract entered into in Belgium. Amongst the defendants was M. Drouet, the Belgian Secretary of Legation. M. Drouet duly entered an appearance, and the case was proceeded with till ready for trial, the defendants having even obtained a rule for a special jury. A summons was then taken out on M. Drouet's behalf, calling upon the plaintiffs to show cause why all further proceedings should not be stayed or his name struck out of the proceedings, on the ground that he was a foreign minister.

Judgment.] It was held, first, that a secretary of legation was entitled to all the privileges of an ambassador; secondly, that he did not forfeit his privilege of immunity from jurisdiction by engaging in mercantile pursuits here; but, thirdly, that having voluntarily attorned to the jurisdiction, M. Drouet was estopped from setting up his privilege, although in the event of judgment being given against him, no execution could be taken out against either his person or property, this being precluded by the Act of 7 Anne, c. 12.

Taylor v. Best, 14 Com. Bench, 487.

(c) The arguments in this case are set out at considerable length by Wheaton, and are well worth perusal; see Wheaton, by Boyd, pp. 333—345.

The immunity of an ambassador from civil execution has already been dealt with. In *Taylor v. Best* the Court had to determine how far an ambassador was amenable to the earlier stages of civil jurisdiction. The result was that, whilst fully recognising his immunity from civil execution, it yet held that he was amenable to the local jurisdiction by reason of his attornment; the question being left open as to whether he could be brought unwillingly before the courts by process not affecting his person or his goods. The effect of this case, however, has since been modified by the decision in the case of *The Magdalena Steam Navigation Co. v. Martin* (28 L. J., Q. B., N. S. 310). In this case, the defendant, a foreign ambassador, on being sued for calls on shares in a company in liquidation, pleaded to the jurisdiction on the ground of his privilege as an ambassador. On demurrer judgment was given for the defendant, it being laid down that a public minister of a foreign State accredited to Great Britain, having no real property here, and having done nothing to disentitle him to the ordinary privilege of an ambassador, could not be sued in the courts of this country, even though neither his person nor his goods were touched by the suit. As to a suggestion that the action might be prosecuted to judgment with the view of ascertaining the amount of the debt, the Court held that such a view was untenable; that such proceedings would be anomalous, and would violate the principle laid down by Grotius (*d*), "*Omnis coactio abesse a legato debet*;" they would produce the most serious inconvenience to the defendant, and would hardly be of any benefit to the plaintiff.

This case seems to establish the entire immunity of an ambassador from civil jurisdiction under the English law. If an ambassador contracts debts which he refuses to pay, and if he also refuses to submit to the local jurisdiction, creditors have no remedy but to apply to the Minister of Foreign Affairs of the ambassador's own country (*e*). Neither is there, it would seem, any power to compel a diplomatic agent or a member of his suite, to attend the local tribunals, or even to give evidence concerning any matter. When evidence is required from an ambassador or a member of his suite, the practice is to request that the ambassador will consent to furnish such evidence, and, although he may decline, yet it is not customary for him to do so. The evidence, if given, is generally taken before a diplomatic officer, or some official whom the minister consents to receive, and is then transmitted to the Court in writing. Where, however, by the local laws, evidence must be given orally before the Court in the presence of the accused, it is usual for the minister to submit himself for examination in the ordinary way. On the trial of Herbert for murder at Washington, in 1856, the Minister for the Netherlands,

(*d*) L. 2, c. 18, s. 9.
C.I.L.

(*e*) Wheaton, by Boyd, p. 327.

an important witness, refused to appear in Court at the request of the United States Government. His own Government also refused to instruct him to appear as a witness, although requested to do so by the United States. Thereupon, the United States Government, whilst admitting his right to decline to appear, demanded his recall (*f*).

In the *New Chile Co. v. Blanco* (4 T. L. R. 346), the question was incidentally discussed as to how far the minister of a friendly State accredited to and resident within the territory of another foreign Power, could be made amenable to the English jurisdiction. An action had been commenced in the English Courts against the defendant, who was the Minister of Venezuela, accredited to the French Government and resident in Paris; service having been effected on him whilst in Paris, an application was made to the Queen's Bench Division to set this aside; the order was discharged on other grounds, and no judgment was given on the point. Huddleston, B., thought the privilege of an ambassador was confined to foreign representatives accredited to this country; but Manisty, J., expressed an opinion that the immunity of an ambassador as recognized by the courts of this country, would be violated by compelling an ambassador accredited to a foreign country, to appear and defend himself in Great Britain.

PANTALEON SA'S CASE.

Temp. 1653.

[ZOUCH, SOLUTIO QUESTIONIS VETERIS ET NOVÆ, SIVE DE LEGATI DELINQUENTIS JUDICE COMPETENTE DISSERTATIO, IN PRÆFATIONE; PHILLIMORE II., 211.]

Case.] Pantaleon Sa, who was the brother and one of the train of the Portuguese Ambassador under Cromwell, fell into a quarrel with one Gerrard about some matter, in the New Exchange, and wounded him, the latter's life only being saved by the interference of a by-stander. The next night, Sa came to the same place with fifty of his fellow-countrymen, armed to the teeth, with the intention of destroying his adversary. Many persons were wounded and one killed; the Guards were called in, and were fired upon by the Portuguese. Some of the latter were arrested, but Sa and others took refuge in the house

(*f*) See Calvo, § 583—4, and note.

of the Portuguese Ambassador, by whom they were subsequently surrendered.

Opinion and Result.] The matter was referred by Cromwell to a special Court of Delegates, who, after examination, came to the conclusion that Sa was amenable to our laws. He was then indicted, tried by a jury under a Commission of Oyer and Terminer, found guilty and suffered death. It appears from a report of the case, that if Sa had been an ambassador his privilege would have protected him, but a distinction was made between the principal and members of his train.

Pantaleon Sa's Case: Zouch; Phillimore, II., 211.

Notwithstanding the decision in Sa's case, by modern usage, the immunities of an ambassador are commonly extended to members of his family living with him because of their relationship to him; to members of his suite because of their necessity to him in his official relations; and also to his domestic and other servants because of their necessity to his dignity and comfort (*g*). An official list of these is generally required to be furnished to the Minister of Foreign Affairs.

Members of the Embassy are distributed by Calvo into three classes:—Counsellors, Secretaries, and Attachés. Some of these possess a privilege in their own right; such is ordinarily the case with the Secretary of Legation, who is personally accredited to the Minister for Foreign Affairs. The Secretary to the Embassy is also frequently treated as an official person distinct from the general suite. But other members of the ambassador's suite only derive their privilege from their relation to the ambassador (*gg*).

The duties of the ambassador's staff consist in supporting the Minister, in preparing and forwarding official despatches, in transmitting communications between their chief and the authorities of the country to which he is accredited, in classifying and keeping the archives of the mission, in ciphering and deciphering despatches, and in making minutes of the Minister's letters and the like.

In *Parkinson v. Potter* (L. R. 16 Q. B. D. 152), it was held that the privilege of embassy extended to a person, if there was evidence that he was treated at the foreign embassy as a member of the legation and was employed from time to time by the minister, and that if this were so, the Court would not measure the quantum of service rendered or required; in the same case it was recognized that an attaché to an ambassador in this country, was not liable for

(*g*) See Hall, p. 174.

(*gg*) See Calvo, I., p. 486.

rates assessed on his private residence. Matthew, J., in the course of his judgment, said that apart from 7 Anne, c. 12, s. 3, the privilege of the embassy was recognized by the Common Law of England as forming part of International Law, and according to that law it was clear that all persons associated in the performance of the duties of the embassy were privileged, and that an attaché was within that privilege. In *Hopkins v. De Robeck* (3 T. R. 79), the Court had recognized the privilege in the case of a secretary to an embassy, and had also recognized that an attaché came within the same principle. But in *Novello v. Toogood* (1 B. & C. 554), it was held that the goods of a chorister in the service of the Portuguese Ambassador, who was at the same time carrying on the business of a lodging-house keeper in the house in question, were not privileged from distress for poor-rates.

In regard to criminal offences, if one of the suite commits a crime outside the ambassador's house, the proper course for the local authorities to adopt is to deliver him up to the ambassador, who should collect the evidence relating to the case and send the accused to his own Government for trial. But though these are the strict rights of the ambassador, the more convenient course is for the ambassador to send the offender to the local tribunals for trial.

It should be observed that the English law on this subject is exceptional. An illustration of this is afforded by the action of the British authorities in the case of a servant of Mr. Gallatin, the United States minister in London. This servant having committed an assault outside the limits of the ambassador's house, the local authorities claimed jurisdiction, and also claimed the right of arresting the offender within the minister's house; although it was admitted that, as a matter of courtesy, notice should be given of the intention to arrest, so that either the offender might be voluntarily handed over by the ambassador, or, failing this, might be arrested by the local authorities at a time convenient to the minister (h).

The privilege usually accorded to members of an ambassador's suite, does not strictly extend to accused persons or fugitive criminals taking refuge in an ambassador's house. In 1867, a Russian subject, not in the employ of the ambassador, attacked and wounded an attaché in the Russian embassy in Paris; the Russian Government requested his surrender, but the French authorities refused the surrender, on the ground that the fiction of extritoriality could not be extended to embrace his case, and on the further ground that the immunities of the house, if any, had been waived by the police having been called in (i). But in less civilized countries, the foreign embassies are frequently resorted to as an asylum in times of political tumult.

(h) See Hall, p. 177.

(i) See Wheaton by Dana, note No. 129.

VIVEASH v. BECKER.*Temp.* 1814.

[3 MAULE & SELWYN, 284.]

Case.] The defendant, a merchant resident in London, was arrested in 1814, for a debt of 548*l.*, and compelled to give a bail bond. A rule *nisi* for delivery up of the bond was obtained on his behalf, on the ground that he had been appointed Consul to the Duke of Oldenburg, and was acting in this capacity.

Judgment.] On the application to make the rule absolute, Lord Ellenborough expressed the opinion that a consul was entitled only to a limited privilege, such as safe conduct, and if this was violated, his Sovereign had a right to complain; but it had been laid down that a consul was not a public minister, and was not entitled to the *jus gentium*. The Act of Anne, which mentioned only ambassadors and public ministers, must be considered as declaratory, not only of what the Law of Nations was, but of the extent to which it should be carried. A different construction would lead to enormous inconvenience, for consuls had the right of creating vice-consuls, and they, too, must have similar privileges. Thus a consul might appoint a vice-consul in every port, to be armed with the same immunities, and this might become the means of creating an exemption from arrest indirectly, which the Crown itself could not grant directly. Under these circumstances it was held that no privilege existed, that the defendant was liable to arrest, and that the application must be refused.

Viveash v. Becker, 3 Mau. & Sel. 284.

This case is cited as illustrating the difference between the status of a consul and that of an ambassador, the former being subject to the local law, except in regard to certain specified matters, whilst the latter is not. The distinction was referred to in the American case of *The Anne* (8 Wheat. 435), where it was laid down that although a consul was in some sense a public agent, he was only

clothed with authority for commercial purposes, and that although he had a right to interpose claims on behalf of the subjects of the country for which he acted, yet he was not entitled to be considered as the agent of his Sovereign, or as entrusted by virtue of his office with authority to represent him in his negotiations with foreign States, or to vindicate his prerogative.

Consuls are in fact merely the commercial agents of a Government in foreign parts. They are not even always subjects of the State in whose service they are, and are not infrequently subjects of the State in which they act. But whether this be so or not, they become subject to its laws, and are not strictly entitled to any privilege beyond other residents except in the following particulars:—(1) A consul is not usually subject to personal obligations that may attach to citizens of the State in which he is deputed to act, such as service in its militia or constabulary, or on its juries; he is not liable to have soldiers quartered on him, nor is he subject to the payment of personal taxes, though he is subject to other forms of taxation; (2) he is not amenable to the local jurisdiction in respect of acts done by order of the Government in whose service he is, or in respect of political offences, until his commission is withdrawn; (3) he has the right of having his Government's arms over his house; (4) the consular papers and archives are exempt from seizure. In time of war his house and papers would also be exempt from injury or molestation, except in cases of military necessity. In other respects a consul is amenable to the local laws and subject to the process of the local courts, but if charged with an offence he ought either to be admitted to bail or kept under surveillance in his own house, in order that his service to his own Government may not be prejudiced. In case of arrest, his commission would probably be at once determined by his own Government, or his *exequatur* withdrawn (ii). Any outrage or insult inflicted on him would necessarily be regarded as more grave than it would be in the case of an ordinary foreign resident.

Various grades of consular authority are recognized, of which the more important are the following:—(1) Consuls-general, who exercise functions over several places and sometimes over a whole country, (2) Consuls, (3) Vice-consuls and (4) Consular agents. The two latter classes, as a general rule correspond only through the consul or consul-general (k). Consuls-general and consuls are usually appointed under commissions issued by their own Government, and communicated to the Government within whose territory they are to act. Vice-consuls and consular agents are usually appointed under

(ii) See next page.

(k) In Great Britain the Consular Service embraces the following ranks:

—Agents and Consuls-general, Consuls-general, Consuls, Vice-Consuls, Consular Agents, and Pro-Consuls.

letters-patent, sometimes issued by the Government they represent, and sometimes by the consul or consul-general to whom they are subordinate. Before acting, consuls must obtain an *exequatur* or formal permit from the Government in whose territory they are to act. This sometimes takes the form of letters-patent issued by the latter Government, but in other countries mere notice or an endorsement of their commission, is regarded as sufficient. This permit may be refused if the person appointed is not acceptable to the State within which he is to act, or it may be withdrawn if the consul should exceed his functions or act in an unfriendly or improper manner.

The functions of a consul are mainly as follows :—(1) To watch over the commercial interests of the country he represents, and to see that the local laws are properly administered in reference to its subjects, and that commercial treaties are duly carried out ; (2) to collect information for his own Government on commercial, economical, and political matters, and to embody this in a periodical report ; (3) to assist subjects of the State for which he acts, when in distress, and, if need be, to remit shipwrecked sailors and destitute persons to their own country ; (4) to perform certain quasi judicial acts, such as the administration of oaths, the receiving of protests and reports from masters of vessels, the authentication of births, deaths, and marriages, and of judicial and mercantile instruments, the administration of the property of subjects of his own State dying intestate within the local jurisdiction ; (5) to conduct arbitration proceedings, and exercise a voluntary jurisdiction in disputes between his own countrymen, especially in commercial disputes, and to exercise a disciplinary jurisdiction (though not to the exclusion of the local courts, except where this is warranted by convention) over the crews of vessels belonging to his State. Very often his sphere of duties is enlarged by instructions from his own Government, and in some cases his powers and privileges are enlarged by convention between the State employing him and the State in which he acts (*1*). But throughout, his position is quite distinct from that of an ambassador, except in non-Christian countries such as Turkey, Egypt, China, and

(2) The more important privileges and powers secured to United States Consuls in different countries by treaty, are (1) inviolability of the consular office and dwelling-house, (2) exemption from arrest and from obligation to appear as witness, or to discharge other public duties, (3) exemption from taxation, military billeting or service, (4) the right to apply to the local authorities in the event of any infraction of treaties, (5) the right to display the

national arms and flag over the Consulate, (6) the right to take depositions, to exercise a voluntary jurisdiction in certain kinds of disputes, (7) the right to reclaim deserters from United States vessels, (8) the right to intervene on behalf of United States interests in questions of wreck and salvage, and (9) the right to take out administration in regard to the estates of United States citizens dying within the local jurisdiction.

Japan. At times, however, a consul is deputed to act as *chargé d'affaires*, and in such case he becomes temporarily invested with diplomatic functions and privileges. Official representations cannot in strictness be made through a consul, but should be made through the diplomatic agent of the country he represents.

In certain non-Christian countries, or countries not strictly within the pale of International Law, consuls occupy a different position and exercise more important functions. Owing to the differences of custom and religion, European Governments, from a comparatively early time, refused to allow their subjects who settled in such countries, to pass under the jurisdiction of the local laws and courts. The result has been to establish certain extra-territorial communities, which whilst existing within the territory of such countries, are nevertheless deemed to be outside it for the purposes of jurisdiction, and to remain subject to the law and courts of the country to which their members belong; this jurisdiction, in the first instance, being generally vested in the consul. Such arrangements usually depend on treaty; and in Great Britain the exercise of such extra-territorial jurisdiction by British officers and Courts must also be confirmed by Statute. These arrangements, depending as they do upon particular treaties and statutes, do not properly belong to International Law. The system, however, deserves to be noticed, both as affording another instance of those immunities commonly classed under the head of extraterritoriality, and as illustrating the different position and functions of consuls in such countries.

As between Great Britain and China, the immunity of British subjects resident in China and the exercise of the consular jurisdiction over them, are provided for by the Treaties of 1842, 1843, and 1858; and as between Great Britain and Japan by the Treaty of 1858. Under these treaties disputes between a British subject and a native are in the first instance to be referred to the consul, who is to enquire into the merits and endeavour to arrange the matter amicably. If he cannot do this, he is to request the assistance of a native officer, in conjunction with whom he shall then enquire into the case and decide it equitably. All questions relating to person or property, arising between British subjects only, are to be subject to the jurisdiction of the British authorities. Natives committing offences against British subjects are to be punished by the native authorities according to the native law. British subjects committing offences against natives or against the subjects of any other country, are to be punished by the consul, or other public functionary authorized thereto, according to British law. Regarding the punishment of British subjects, the British Government undertakes to enact the necessary laws to attain that end. The Treaty of 1858 with China, whilst opening up eight new ports

to foreign trade, in addition to the five opened up by the Treaty of 1842, also authorized Great Britain to establish and maintain in China itself, a Supreme Court and various provincial Courts. The Supreme Court of China and Japan, has its seat at Shanghai, and the consuls have been made *ex officio* provincial judges, each acting in his own district, and exercising a jurisdiction subordinate to that of the Supreme Court (*m*). The necessary authority to exercise jurisdiction of this kind in countries outside the British dominions is given by the British Foreign Jurisdiction Acts, 1843 to 1878; the jurisdiction being regulated by Orders in Council issued under those Acts. The powers of consuls in China and Japan are regulated by an Order in Council of 1865.

A general system of Consular Courts has also been established throughout the dominions of the Ottoman Porte. By treaty and convention, power has been given to the more important Christian States to exercise jurisdiction according to their own laws, over their subjects resident within the Turkish dominions. No power is given to exercise jurisdiction over the subjects of other countries, this being left for arrangement between the Powers whose subjects are concerned. The British consular jurisdiction in Turkey (excluding Egypt) is now regulated by Orders in Council passed in 1873, 1874, and 1875. The British consular jurisdiction in Egypt is regulated by a separate Order in Council passed in 1876.

Residence in a foreign country as consul, will not in itself impart an intention of acquiring domicile there. Thus in *Niboyet v. Niboyet* (L. R. 4 P. D. 1), the Court whilst granting the relief prayed for, admitted that the domicile of the husband, although he was resident in England, had remained French by reason of his having acted as French consul. If, however, a person were a native of the country in which he acted, or if he were to carry on business in such country, his domicile there would be recognized, notwithstanding the fact of his acting as consul for some other country (*mm*). In any case, moreover, a person carrying on trade in a belligerent country in time of war, would not be exempted from liability in respect of his property by reason of his acting as consul for a neutral State (*n*).

(*m*) See Phillimore, II., 341.

(*mm*) See p. 103, *supra*.

(*n*) See *Sorensen v. The Queen*, 11 Moo. P. C. C. 141.

MCLEOD'S CASE.*Temp.* 1842.

[PARLIAMENTARY PAPERS, 1843, VOL. LXI.]

Case.] McLeod was a British officer who had taken part in the attack on the "Caroline" (o). In the course of this attack a United States citizen, Durfee by name, had been killed. McLeod was afterwards arrested whilst in the United States, and charged with the murder. The British Minister at Washington demanded his release, calling attention to the fact that the destruction of the ship was a public act, done by persons in the employ of Her Majesty's Government, in obedience to superior orders, and that the responsibility, if any, rested with Her Majesty's Government. The United States Government replied that as the matter was in the hands of the Courts, it was out of their power to release McLeod summarily. McLeod was subsequently brought to trial, but acquitted. Mr. Webster, the Foreign Secretary, subsequently admitted that after the avowal of the transaction as a public one by the British Government, no further responsibility existed on the part of the agent; and in the following year an Act of Congress was passed providing that subjects of foreign Powers taken into custody for acts done under public authority should be discharged.

McLeod's Case; Parliamentary Papers, 1843,
Vol. LXI.

McLeod's case is cited as illustrative of the immunity of public agents for acts done in their official capacity.

Neither officers in command of armed forces, nor the members of their forces, are amenable to the criminal or civil laws of a foreign State in respect of acts done in their official capacity. The acts done may afford a *casus belli* against the State, but not a cause of action against the individual.

(o) An account of this case will be found on p. 240, *infra*.

SLAVE TRADE.

"LE LOUIS."*Temp. 1817.*

[2 DODS. 210.]

Case.] In 1816, "Le Louis," a French ship, was captured by an English colonial armed vessel, on suspicion of being engaged in the slave trade, and for resisting a demand for visit and search. She was taken to Sierra Leone and there condemned by a Court of Vice-Admiralty, for having been concerned in the slave trade, contrary to French law. Against the order of condemnation an appeal was made to the High Court of Admiralty.

Judgment.] Sir William Scott, in giving judgment, after adverting to the fact that the commander of the English vessel had been authorized to seize and detain all vessels offending against the slave trade, observed that neither any British Act of Parliament, nor any commission founded on it, could affect the rights or interests of foreigners, unless it was founded upon principles and imposed regulations consistent with the Law of Nations. The first matter of inquiry therefore was, whether there was, in the present circumstances, and by the Law of Nations, any such right of visitation and search. If there was no such right, and if it was only in the course of an illegal exercise of this right, that it was ascertained that "Le Louis" was a French ship trading in slaves, then this fact having been made known to the captor by his own unwarranted acts, he could not avail himself of discoveries so produced. At present no nation could exercise a right of visitation and search upon the common and unappropriated parts of the sea, save only on the belligerent claim. There being no such belligerent claim, the right of visit, in the present case, could only be legalised upon the ground that the captured vessel was to be regarded legally as a pirate. But slave traffic was not piracy or even a crime by the

universal Law of Nations. A nation had a right to enforce its own municipal rules and navigation laws, so far as such enforcement did not interfere with the rights of others, but it had no right under cover of its municipal regulations to visit and search all the *apparent* vessels of other countries on the high seas, in order to institute an inquiry whether they were not its own vessels violating its own laws.

Moreover, after reviewing the facts, the learned Judge came to the conclusion that the captor had not proved the existence of a French prohibitory law, and upon this, as well as upon the other grounds, he felt himself called upon to reverse the judgment of the Court below.

Le Louis, 2 Dods. 210.

This decision embodies two important principles : (1.) That the right of visit and search on the high seas is strictly a war right, and cannot, except in certain specified cases, such as piracy, be exercised by the public vessels of one nation against the private vessels of another, in time of peace. (2.) That the slave trade, though it may be dealt with as piracy by municipal law, yet cannot be regarded as piracy by the Law of Nations, except by universal consent.

The slave trade was for long regarded as a lawful and desirable branch of traffic. The moral feeling of mankind asserted itself but slowly ; but at length the slave trade was made illegal by the municipal law of most maritime countries, although slavery was still tolerated. In Great Britain the slave trade was made illegal in 1808 ; and this example was soon afterwards followed by the United States, and ultimately by the other States of Europe. By later enactments, it was made piracy under the municipal regulations of most civilized States.

After the slave trade had thus been declared illegal, the question arose as to the right of the public vessels of one nation to interfere with this traffic when carried on by the traders of another nation. The earlier principle adopted by the British Courts seems to have been, that a public vessel had a right to visit search and bring in for adjudication any vessel found trading in slaves, subject to a right on the part of the latter to be released, on showing that the slave trade was allowed by the law of the country to which she belonged. Thus, in the case of the *Amedie* (1 Acton, 240), an American vessel was engaged in carrying a cargo of slaves from Bónny, on the coast of Africa, to Matanzas, in the island of Cuba ;

she was thereupon captured by an English vessel, and subsequently condemned by the Vice-Admiralty Court of Tortola for being engaged in an illegal traffic. This decree was affirmed on appeal, Sir William Grant holding that the trade was *prima facie* illegal, and there was thrown on the claimant the burden of proving that by the particular law of his own country, he was entitled to carry on the traffic. This decision was followed in the subsequent case of the *Fortuna* (1 Dods. 81). In the case of the *Diana* (1 Dods. 95), a Swedish vessel, after taking a cargo on board at Gustavia St. Bartholomew, exchanged this at Cape Mount for one of slaves; whilst carrying these to a Swedish island in the West Indies she was seized by H.M.S. "Crocodyle," and brought in for adjudication. The ship and cargo were condemned by the Vice-Admiralty Court of Sierra Leone, but the decree of that Court was reversed on appeal, on the ground that Sweden had not prohibited the trade, and had tolerated it in practice; this decision being also in accordance with the principle of the *Amedie*.

All these cases, however, seem to have been overruled by the decision in the case of *Le Louis*, which has been followed in subsequent cases. In *Madrazo v. Willes* (3 B. & A. 353), the plaintiff was a Spanish merchant, whose ship had been seized by the defendant, a captain in the Royal Navy, whilst engaged in the slave trade; in an action for compensation, the plaintiff obtained a verdict for 21,180*l.* damages, 18,180*l.* being in respect of the profit on the cargo of slaves. The defendant applied to have the damages reduced by that sum, on the ground that the slave trade was unlawful by the law of England, but this application was refused. Bayley, J., laid down that the British statutes against the slave trade could not affect the subjects of other countries engaging in the slave trade outside the limits of British territory, and that the slave trade was not piracy *jure gentium*, although it might have been made so by municipal law.

It will be seen from the case of the *Antelope*, and appended cases, that a similar course has been pursued by the courts of the United States.

THE "ANTELOPE."*Temp.* 1825.

[10 WHEATON, 66.]

Case.] In 1819, the "Columbia," a privateer, entered Baltimore, clandestinely shipped thirty or forty men, proceeded to sea and hoisted the Artegan flag, assuming the name of the "Arraganta." She then captured an American vessel, from which she took twenty-five slaves; also several Portuguese vessels, and the "Antelope" a Spanish vessel, from each of which she took some slaves (*p*). The "Arraganta" and "Antelope" then sailed in company to Brazil, where the former was wrecked. Some of the crew and all the slaves were then put on board the "Antelope," which assumed the name of the "General Ramirez," under the command of John Smith. She was subsequently captured by a United States revenue cutter, and brought into Savannah for adjudication. The slaves were claimed by the Portuguese and Spanish Consuls on behalf of the original owners, by Smith as captured *jure belli*, and by the United States as having been transported from foreign parts by American citizens in contravention of United States laws, and as entitled to their freedom by those laws and by the Law of Nations.

The Circuit Court dismissed the claim of John Smith, and also the claim of the United States except as to that portion of the slaves which had been taken from the American vessel, those remaining being divided between the Spanish and Portuguese claimants.

An appeal was taken to the Supreme Court.

Judgment.] Marshall, C. J., in giving judgment, stated that if, as it appeared, the slave trade was neither repugnant to the Law of Nations nor piracy, the right of bringing in a vessel for adjudication on this ground in time of peace, even where it

(*p*) It will be remembered that during the Spanish American War of Independence, the revolted colonies of Spain fitted out privateers with the object of preying on Spanish commerce.

belonged to a nation that had prohibited the trade, could not be upheld. It was not the practice of the courts of any country to execute the penal laws of another. Every foreign vessel captured by United States cruisers in time of peace for slave trading, must be restored. The decree, therefore, of the Circuit Court, so far as it directed restitution to the Spanish claimant of slaves found in the "Antelope" when captured was confirmed, the *onus probandi* as to which slaves belonged to him being on the claimant; but the Portuguese slaves were decreed to be delivered up to the United States, inasmuch as there was not sufficient proof as to the ownership of them.

The Antelope, 10 Wheat. 66.

The principle, which was laid down by Sir W. Grant in the case of the *Amedia*, seems to have been at first adopted, also, by the United States Courts (*pp*); but it was equally destined to give place to a more correct view of the relation of international to municipal law, and was overruled in the case of the *Antelope*.

Though the slave trade was ultimately made piracy by the municipal law of most European countries, yet the result of these decisions was to preclude, so far as the public vessels of Great Britain and the United States were concerned, any right of capture or visit and search, in regard to the vessels of other nations engaged in the slave trade. To meet this defect, treaties were subsequently entered into between the principal civilized nations, according a mutual right of visit and search under certain conditions, and within certain limits. By treaties of the 30th of November, 1831, and the 22nd of May, 1833, between Great Britain and France, to which nearly all the maritime powers of Europe subsequently acceded, a mutual right of search, with the view to the suppression of the slave trade, was conceded within certain geographical limits. By a treaty between Great Britain, Austria, France, Prussia, and Russia, dated the 20th of December, 1841, and subsequently ratified by all the signatories except France, the operation of the previous treaties was considerably extended. By the treaty of Washington of the 7th of April, 1862, between Great Britain and the United States, it was agreed that such public vessels of each contracting party as might be provided with special instructions for the purpose, should, within certain geographical limits, be at liberty to visit such merchant ships

(*pp*) See the case of *La Jeune Eugénie*, 2 Mason, 409.

of the two nations as might upon reasonable grounds be suspected of being, or of having during the voyage been engaged in, the African slave trade, or of having been fitted out for that purpose. The right of visit was to be exercised only by public vessels over merchant vessels, and was not to be exercised within the limits of a settlement or port, or within the territorial waters of the other contracting party. By a Convention of 1870, certain mixed Courts which had been established by the Treaty of 1862 for the decision of questions of slave trading, were abolished; and vessels captured were directed to be taken to the nearest ports of their own country for adjudication.

In 1883 Turkey became a party to this league of nations for the suppression of the slave trade. Moreover, in 1885, by Article IX. of the General Act of the Berlin Conference, it was declared that trading in slaves was contrary to the principles of International Law, as recognized by the signatory Powers, and that the operations which by sea or land furnished slaves for trade ought also to be regarded as forbidden. The Article further provided, on the part of the Powers exercising sovereign rights over the territories within the basin of the Congo, that these territories should not serve as a market or means of transit for the trade in slaves, of whatever race they might be, and that each Power should employ all the means at its disposal for putting an end to this trade and for punishing those engaging in it.

PIRACY.

THE UNITED STATES v. SMITH.

Temp. 1820.

[5 WHEATON, 153.]

Case.] In 1819, Thomas Smith was indicted before the Circuit Court of Virginia for piracy. Smith and others formed part of the crew of a private armed vessel, which had been commissioned by the Government of Buenos Ayres, a colony at war with Spain; they subsequently mutinied, and having seized another private armed vessel, commissioned by the Government of Artigas, which was also at war with Spain, they proceeded on a cruise, in the course of which they plundered and robbed a Spanish vessel. A special verdict on the facts having been returned, the matter came before the Circuit Court; this Court was divided in

opinion as to whether the prisoner was guilty of piracy, and the question was reserved for the decision of the Supreme Court.

Judgment.] The first point raised before the Supreme Court was whether an Act of Congress referring to the Law of Nations for a definition of piracy was a constitutional exercise of the power of Congress to define and punish piracy. This was decided in the affirmative. The next point considered was, whether the crime of piracy was defined by the Law of Nations with reasonable certainty. Story, J., in delivering the opinion of the Court, laid down that whatever might be the diversity of definitions in other respects, all jurists concurred in holding robbery or forcible depredation on the high seas to be piracy; they universally treated piracy as an offence against the Law of Nations, and its true definition by that law, was robbery upon the sea. A final objection as to the sufficiency of the special verdict in regard to the facts, was decided in favour of its sufficiency. The Court, Livingston, J., dissenting, held the prisoner guilty of piracy and punishable accordingly.

The United States v. Smith, 5 Wheat. 153.

Piracy, *jure gentium*, may be defined as the offence of depredating on the high seas without lawful commission. It is generally held to embrace any organization for the purpose of plunder on the sea or by descent from the sea, and also murder or robbery on the high seas accompanied by mutiny. According to Mr. Hall, "piracy includes acts differing much from each other in kind and in moral value; but one thing they all have in common—they are done under conditions which render it impossible, or unfair to hold any State responsible for their commission. A pirate either belongs to no State or organized political society, or by the nature of his act, he has shown his intention to reject the authority of that to which he is properly subject. If a body of men of uncertain origin seize upon a vessel and scour the ocean for plunder, no one nation has more control over them or more responsibility for their doings than another, and if the crew of a ship takes possession of it after confining or murdering the captain, legitimate authority has for the time disappeared" (q).

Piracy being an offence *jure gentium*, it follows that the moment

(q) See Hall, p. 255.

a vessel assumes a piratical character, she loses her former nationality; the vessel herself becomes liable to seizure by any public vessel, and her crew to punishment in any Court. But though a pirate may be tried in any Court, and is within the criminal jurisdiction of any State, he is still entitled to regular trial.

The stigma of piracy also attaches to the vessel; but it would seem that in the case of a merchant vessel which has been used for piratical purposes, the taint of piracy will not affect the cargo. In the case of the *Malek Adhel v. The United States* (2 Howard, 210), a vessel had been fitted out with an ordinary armament, quite consistent with her use for commercial purposes; she was subsequently employed by her commander for the purpose of plunder on the high seas, this being done, however, without the knowledge or consent of her owners; it was held that although this constituted piratical aggression within the meaning of the United States laws, yet that such acts would not usually involve or affect the cargo. Moreover, although the taint of piracy attaches to the ship in the first instance, it will not, in the absence of condemnation, travel with the ship through all her transfers to various owners. Thus in *Reg. v. McCleverty* (L. R. 3 P. C. 673), it was held that where a ship had been sold by public auction to a *bona fide* and innocent purchaser, before proceedings had been taken against her by the Crown, she could not afterwards be arrested and condemned, on the ground of having been previously engaged in piratical acts (qq).

Piracy is commonly also the subject of regulation by municipal law, but so far as it is extended by municipal law beyond the limits of piracy *jure gentium*, it affects only subjects of that State (r). In the case of *In re Tiwan* (5 Best & Smith, 645), it was held that an extradition treaty, concluded between Great Britain and the United States, for the delivery up by one nation to the other of all persons charged with piracy committed within the jurisdiction of either, did not extend to piracy *jure gentium* committed upon a United States vessel on the high seas, but merely applied to acts that were made piracy by municipal law; the phrase "within the jurisdiction" being considered equivalent to "within the exclusive jurisdiction," whereas piracy *jure gentium* was justiciable everywhere.

With regard to property captured by pirates, it is a rule of the Law of Nations, derived from Roman Law, that it must be presumed never to have been divested from its original owners. On recapture no *postliminium* is necessary, and the property re-vests in the former owner, although salvage may be payable. In English Law, if not reclaimed by the former owner, the property formerly vested in the

(qq) See also *A.-G. of Hong Kong v. Kwok-a-Sing*, L. R. 5 P. C. 199.

(r) See case of *Le Louis*, p. 123, *supra*.

Crown, whilst property belonging to the pirates themselves vested in the Lord High Admiral. The distinction, however, between *droits* of Crown and *droits* of Admiralty is no longer of any importance.

Besides piracy proper, there are certain offences which are usually classed with piracy. Thus a ship accepting a commission from two Powers has sometimes been deemed piratical; but according to the better opinion, it would seem that if the two Powers are allied, and she attacks only a common enemy, her conduct is irregular only, and not piratical. A natural born subject accepting a commission and committing acts of hostility on the high seas against his native country is deemed guilty of piracy by the municipal laws, both of Great Britain and the United States. There has been some disposition also, to regard as a pirate a subject of a neutral State who accepts a commission from one of two belligerents to cruise against the other. In 1839, during war between France and Mexico, Admiral Baudin, who was in command of the French fleet, issued a notification to the effect that every privateer in the service of the enemy, of which the captain and two-thirds of the crew were not Mexicans by birth, would be regarded as a pirate and her crew treated as such (*s*). In 1846, during war between the United States and Mexico, President Polk suggested to Congress, that it would be a matter for the consideration of their criminal courts, whether the holders of letters of marque issued in blank by the Mexican Government and subsequently sold to foreigners, should not be regarded as pirates (*t*). On the outbreak of the American Civil War, the Confederate States offered their letters of marque to foreigners, but the fact that the acceptance of such a commission would have been penal under the municipal regulations of other States, coupled with the threat of the Federal Government to treat such vessels as piratical, had the effect of preventing this offer from being accepted. The action of belligerents in issuing letters of marque to neutral subjects is frequently prohibited by treaty; whilst the acceptance of such a commission by neutral subjects is generally prohibited by municipal law. The abolition of privateering as between the parties to the Declaration of Paris, 1856, and also as between States that have acceded to the principles of that Declaration, renders the question of the international character of this offence, one of less importance than heretofore. Even if a belligerent is not warranted by existing rules of International Law in treating such conduct as piratical, there can be no doubt that usage discloses a strong tendency in this direction, and in view of the fact that a neutral in accepting such a commission is usually animated only by the motive

(*s*) See Ortolan, vol. i., pp. 219 & 430.

(*t*) *Ibid.* p. 217.

of plunder, there would seem to be good moral ground for the adoption of such a rule, even though it might not perhaps be desirable to inflict the extreme penalty.

THE SERHASSAN PIRATES.

Temp. 1845.

[2 W. Rob. 354.]

Case.] In 1843, complaints arose as to certain acts of piracy committed by a band of pirates infesting the coasts of Borneo and Tangong Dattoo. Information having reached Singapore of the plunder of a trading vessel bound for that port, a pinnace and two cutters were dispatched from H.M.S. "Dido," under the command of Lieutenant Horton, to put down the pirates. Whilst off the coast of Serhassan six prahns, or native boats, were observed approaching the cutters with every indication of hostile designs. On their nearer approach a flag of truce was hoisted and the crews of the prahns were addressed in their native language and their purpose was demanded. In spite of this the prahns continued to advance and attacked the boats. The result of the encounter was that all the prahns were captured. A motion was made to the Court of Admiralty to decree bounty for the capture under 6 Geo. IV., c. 49. The motion was opposed on the ground that there was not sufficient evidence that the crews of the prahns were pirates.

Judgment.] The Court in its judgment, after reviewing the facts of the case, stated that it was sufficient to clothe the conduct of the men with a piratical character if they were armed and prepared to commence a piratical attack upon any other person. That the attack was premeditated was clearly shown by the fact that an ambush was placed on shore to cut off the detachment in case they should land. It could make no difference whether they were inhabitants of that or any other island. Nor could it be imagined that the title of pirate attached solely to persons following an avowed piratical occu-

pation upon the high sea. The bounty was accordingly awarded, but the case was not to be made a precedent for others of the kind, where the circumstances might be different. Every one of the cases must depend on its own merits and upon the locality where the transaction took place.

The Serhassan Pirates, 2 W. Rob. 354.

This case is cited as an illustration of the principle that any aggression by sea on the part of persons without lawful commission may be deemed piratical.

THE "HUASCAR."

Temp. 1877.

[PARLIAMENTARY PAPERS, 1877, VOLS. LII. AND LXXXIII.]

Case.] In 1877 a revolutionary outbreak took place in Peru. The ironclad "Huascar" was seized at Callao by her crew and by some of her officers, in the interest of the insurgent leaders. She then cruised off the coast, stopping private vessels, demanding dispatches for the Peruvian Government, and in one case taking a quantity of coal which was not paid for. It also appeared that a British subject was detained on board and compelled to act as engineer. Meanwhile the Peruvian Government had issued a proclamation to the effect that it would not be responsible for the acts of anyone on board the "Huascar." Admiral De Horsey, under these circumstances, summoned the "Huascar" to surrender, and failing this an action was fought, in which the "Huascar" sustained considerable damage but succeeded in escaping under cover of the night. On the following day she surrendered to the Peruvian national squadron. A claim for compensation was thereupon made by the Peruvian Government against Great Britain, in respect of the damage done to the "Huascar."

Opinion.] The British Government refused to entertain the claim, and the matter having been submitted to the law officers of the Crown, the latter advised, that, inasmuch as the vessel

had been taken out of the hands of the proper authorities, and the Peruvian Government had disavowed liability for her acts, she was sailing under no flag, and no redress could be obtained for any acts which she might commit, and that in view of what had occurred the proceedings resorted to by Admiral De Horsey were justifiable. The Peruvian Government also submitted the matter to its law officers, and the latter having advised that the acts of the "Huascar" were piratical, the matter was allowed to drop.

The Huascar, Parliamentary Papers, 1877, Vols. LII and LXXXIII.

In connection with the carrying on of maritime warfare by rebels, two questions may arise : (1) that which arose in the *Huascar*, as to how far neutral States would be justified in treating any interference with their subjects, by the rebels, as piratical ; and (2) that which arose incidentally in the case of the *Virginus*, as to how far the established Government, against which the rebellion is directed, is at liberty to treat neutral subjects taking part in it, as guilty of piratical conduct.

With reference to acts committed by insurgents carrying on war by sea, if their belligerency has been recognized, then, their operations, if confined within the limits usually prescribed to belligerents, would not be regarded as piratical. Thus the cruisers of the Confederate States during the American Civil War were allowed to exercise the right of visit and search, as well as other rights accorded by neutrals to a belligerent State.

Greater difficulty occurs in considering the case of insurgents whose belligerency has not been recognized. As a body they are unknown to International Law, and therefore, at first sight, acts committed by them appear to be piratical. But the question is really one of fact and degree. If the rebellion is one of any magnitude and there exists any organization capable of keeping order amongst its members, there will be a state of *de facto* belligerency, which will prevent acts done with the *bonâ fide* intent of assisting military operations, from being deemed piratical, even though they may affect prejudicially the interests of the subjects of other States. In the event of such an organization being comparatively insignificant, there would be greater reluctance on the part of foreign nations to allow the persons or property of their subjects to be interfered with. In no case, moreover, should military or naval operations be allowed to become a mere

cloak for the commission of depredations. In such cases the persons concerned if apprehended might well be subjected to punishment, as being guilty of acts in their nature piratical.

On the occasion of the seizure of a Spanish squadron in 1873, by the Carthagena insurgents, instructions were issued by the British Foreign Office to the Admiralty, that if the insurgents committed acts of piracy against British subjects or affecting British interests, they should be treated as pirates, the Spanish Government having deprived them of the protection of its flag, but that in default of this they were not to be interfered with.

THE "VIRGINIUS."

Temp. 1874.

[PARLIAMENTARY PAPERS, 1874, VOL. LXXVI.]

Case.] The "Virginus" was a registered United States vessel, but had, in fact, for some time previous to July 1873, been employed in the service of the Cuban insurgents. She arrived at Kingston on the 9th of that month. On the following morning the Spanish war-ship, "Charrakia" which had followed her from Colon, arrived in the harbour and took up her position near her. The "Charrakia," however, left Kingston on the 16th of July. The "Virginus" remained there until the 23rd of October, when she cleared nominally for Limon Bay, Costa Rica; but instead of proceeding there, she really made for the coast of Cuba, and after being chased by a Spanish war-ship, put into Port-au-Prince, Hayti, where she shipped a quantity of ammunition. Thence she proceeded again to the coast of Cuba, when she was again chased and eventually captured by the Spanish war-ship "Tornado" on the 1st of November. The ship was taken to Santiago de Cuba. Four of her passengers were tried on the 3rd of November, and were shot on the 4th. Later, sixteen British subjects, part of the crew, were shot in spite of the protests of the British authorities, and seven more were detained in prison. Great Britain thereupon declared that she would hold the Spanish Government responsible for any further executions,

reserving for the time being the question of the executions that had already taken place. The Spanish Government ultimately agreed to place the surviving British subjects at the disposal of the United States Government, as they were captured on board what was nominally a United States vessel, and added that the Governor-General of Cuba was instructed to order an immediate investigation into the matter, from which it would be seen whether the families of the British subjects sentenced to death had a right to indemnification.

In the course of the negotiations the Spanish Government called attention to the fact, that it appeared from the declarations of the captain and some of the crew of the "Virginus," that they had touched at Port-au-Prince in Hayti and other places in the same island, and had taken on board arms and ammunitions of war; that they had thence proceeded towards the coast of Cuba with the view of landing the arms and ammunition; and that they had on board some of the principal chiefs of the insurrection, and other persons who came to strengthen its diminished forces in the island. On these grounds the Spanish Government contended that both vessel and those on board were liable to be treated as piratical. In spite of this contention, in March, 1874, a demand for compensation was made by Great Britain. No complaint was made on account of the seizure of the "Virginus" or the detention of her crew. The ground of complaint was, that, assuming the vessel to have been lawfully seized and the crew properly detained, there was no justification for their summary execution after an irregular proceeding before a drumhead court-martial. No possible aspect of the character of the "Virginus" and her crew could authorize or palliate such conduct, and there was no pretence for treating the expedition as piracy *jure gentium*. Even if the "Virginus" was to be regarded as a vessel piratically engaged in a hostile or belligerent enterprise, such treatment would not have been justifiable. Much might be excused in regard to acts done under the expectation of instant damage and in self-defence, whether by a nation or by an individual. But after the capture of the

"*Virginius*," and the detention of her crew was effected, no pretence of imminent necessity of self-defence could be alleged; and it then became the duty of the Spanish authorities to prosecute the offenders in proper form of law, and to institute regular proceedings on a definite charge, before the execution of the prisoners. It was maintained that there was no charge known either to the Law of Nations or to any municipal law, under which persons in the situation of the British crew of the "*Virginius*" could justifiably have been condemned to death. They were persons not owing allegiance to Spain, the acts done by them were done out of the jurisdiction of Spain, they were essentially non-combatants in their employment, and they could not, by any possible construction, be deemed to have rendered themselves liable to the penalty of death. Ultimately the Spanish Government was compelled to make compensation to the families of the British subjects who had been executed.

Meanwhile, a question of a somewhat different character arose between the United States and Spain. On the 29th of November, 1873, a protocol was entered into between those Powers, whereby Spain agreed to restore the vessel and the survivors of the passengers and crew forthwith, and further to salute the United States flag on the ensuing 25th of December, unless she should in the meantime prove that the ship was not entitled to carry the United States flag. The matter was submitted to the United States Attorney-General for his opinion, as to whether the vessel was at the time of capture entitled to carry the United States flag. He gave an opinion on the 12th of December, that she was not so entitled, inasmuch as she had not then been registered in accordance with the law of the United States; but he also expressed an opinion that she was as much exempt from interference on the high seas as she would have been if lawfully registered. Spain had a right to capture vessels with an American register and carrying the American flag, found in her own waters assisting or endeavouring to assist the Cuban insurrection; but she had no right to capture such vessels upon the high seas, upon an

apprehension that, in violation of the neutrality or navigation laws of the United States, they were on their way to assist the rebellion; she might defend her territory and people from the hostile attack of what was, or appeared to be, an American vessel; but she had no jurisdiction whatever on the question as to whether or not such vessel was on the high seas in violation of any law of the United States.

In the result the vessel was surrendered to the United States authorities in the Island of Cuba on the 16th of December, 1874. On her way thence to the United States she met with bad weather and sank off Cape Fear.

The Virginius, Parliamentary Papers, 1874, Vol. LXXVI.

The two questions in issue in the case of the *Virginius* were substantially, (1) the treatment of persons, especially subjects of other States, found engaged in furthering an insurrection; and (2) the question of the finality of the flag on the high seas.

In regard to the first question, the views expressed by the British Government may be regarded as a correct exposition of International Law on this subject. Even if piratical, such persons were, except under circumstances of imminent necessity, entitled to a regular trial; in addition to this, the conduct of those who were merely members of the crew of the "*Virginius*" and who were British subjects, and consequently owed no allegiance to Spain, could scarcely be deemed to fall within the limits of piracy.

In regard to the question of the finality of the flag, it is necessary to remember, that had the Cuban insurgents been recognized as belligerents, the public vessels of each of the combatants would then have been entitled to exercise as a war-right, the right of visit and search in regard to vessels flying the neutral flag on the high seas. But even where there is no recognition of belligerency, it can scarcely be maintained that the mere fact of flying a foreign flag is altogether final, and absolutely precludes a State engaged in suppressing an insurrection from molesting a vessel suspected of aiding rebels. If there were reasonable ground for believing that such a vessel was really engaged in a hostile expedition, or that it was really owned by subjects of the State threatened, a public vessel of that State might reasonably, and as a matter of self-preservation, exercise a right of visit and search, and if its suspicions were confirmed, capture the vessel so employed. The fact of the ship carrying the flag or register of another nation would,

of course, render additional caution necessary, and reasonable proximity to the territory threatened would probably be regarded as essential to justify such interference. Compensation should be made for detention on erroneous grounds, and where there is a conflict of evidence the question should be referred to a third party.

PRIVATEERS.

THE "CURLEW."

Temp. 1812.

[STEWART'S VICE-ADMIRALTY REPORTS, 312.]

Case.] Shortly after the outbreak of war in 1812 between Great Britain and the United States, the "Curlew," an American privateer, was captured by a British war-ship, and brought into Halifax, Nova Scotia. There was not at the time a sufficient number of British war-ships to protect British trade against the enemy, and a petition was presented to the Court that the "Curlew" might be handed over to certain persons with the view to her being converted into a privateer.

Judgment.] Dr. Croke in giving his decision stated that the Court could not accede to the proposal. Both by the Law of Nations, and the municipal law of the country, the power of granting commissions to privateers was vested in the sovereign or his deputy, and no authority to grant such commissions had been transmitted to the Court. By the Law of Nations, if any private subjects cruised against the enemy without such commission, they were liable to be treated as pirates. Under these circumstances the prayer of the petition was refused.

The Curlew, Stewart's Vice-Admiralty Reports, 312.

Privateers are vessels owned by private persons, but acting in time of war as public war vessels, under commissions from the State, called letters of marque. The practice of employing privateers dates back to a time prior to the existence of permanent navies. It was subsequently sanctioned by universal maritime usage. It had some advantages, especially in enabling a State, not possessed of a permanent navy, to call into being a temporary maritime force. On the other hand, the

object of those who fitted out such vessels was merely private gain, pursued by a system of legalised plunder, and the crews of these vessels, being under little control, were frequently guilty of pillage and outrage. Some attempt to mitigate these evils was made by taking bonds from the owners as security for the appointment of proper officers, and for the good behaviour of the crew. Such vessels were also liable to inspection by public vessels. In the American case of the *Dos Hermanos* (10 Wheaton, 306), it was held that under United States law the only claim that could be made by privateers in respect of their prizes was one in the nature of salvage.

The subject is now of less importance than formerly, privateering having been abolished by the Declaration appended to the Treaty of Paris, 1856, as between the parties thereto. That declaration has since been acceded to by all civilized nations, except the United States, Spain, and Mexico. For the future, therefore, privateers can only be lawfully employed where one of the non-consenting Powers happens to be a party to the war.

In 1870, during the Franco-Prussian war, the Prussians invited private owners to fit out vessels at their own expense, on condition of receiving a large premium on the destruction of French ships of war; the crews and officers were to be furnished by the owners, but the former were to be under naval discipline, whilst the officers were to wear the naval uniform. The French Government protested to Great Britain, suggesting that what was being done constituted a breach of the Declaration of Paris, but the British Government refused to interfere, holding that there was an essential distinction. In 1878, when war seemed imminent with Great Britain, Russia proposed a similar system of depredating on English commerce. Mr. Hall suggests that the view of the matter taken by the British Government in 1870 was incorrect, and that the distinction between these proposals and privateering proper was merely formal^(u). In both cases the armament was provided for the sake of gain, in both cases the crews were to work rather in their own pecuniary interest than in that of their nation. The fact that the Prussian volunteer ships were to be fitted out for the purpose of attacking men-of-war only, was merely incidental to the first Prussian declaration exempting altogether private property on the sea from capture. This was in itself a mere artifice, intended to force the hand of the French Government, and when it failed of this result, it was repealed. Had the so-called volunteer navy been proceeded with, therefore, we may reasonably assume that its operation would have extended to private ships and private property, and would have afforded another instance of the lawless repudiation of treaty engagements.

(u) See Hall, p. 527.

PART II.—WAR.

STEPS SHORT OF WAR.

THE “BOEDES LUST.”

Temp. 1804.

[5 C. ROB. 233.]

Case.] In 1803 disputes arose between Great Britain and Holland, in consequence of which, on the 16th of May, an embargo was laid on all Dutch property. The “Boedes Lust,” a Dutch vessel, was seized on the 19th of May, and in June, war was declared against Holland. On the captors proceeding to adjudication, the property was claimed on behalf of certain persons resident at Demarara on the ground that they were not, either at the time of seizure or of adjudication, in the position of enemies of Great Britain. It appeared that at the time of the seizure under the embargo, Demarara was a Dutch settlement, but the claimants urged that the property had been seized before the actual declaration of war with Holland, and consequently at a time when they were not yet enemies. It further appeared that before the end of the war, Demarara had come again under British control; consequently it was urged that at the time of adjudication the property could not be deemed enemy property.

Judgment.] Sir Wm. Scott in giving judgment stated in effect that the seizure under an embargo was at first equivocal, and if the matter in dispute had terminated in reconciliation the seizure would have been converted into a mere civil embargo, and the property would have been restored; but if, as actually happened in the present case, hostilities ensued, then the out-

break of war had a retroactive effect, and rendered all property previously seized liable to condemnation as enemy property taken in time of war. As to the second contention, he must hold that the property at the time of the capture belonged to subjects of the Batavian Republic, and that the subsequent acquisition of the territory by Great Britain would not preclude the consequences of their original hostile character. A decree of condemnation was therefore pronounced (x).

The Boedes Lust, 5 C. Rob. 233.

The usual methods of extorting redress, short of war, are embargo, retortion, reprisals and pacific blockade.

A hostile embargo consists in the provisional arrest of ships or goods belonging to an offending nation found in the harbours or interior waters of another State. It is adopted either as a means of procuring redress, or as an anticipatory measure to war. If war follows, the ships are liable to condemnation; if not, they are restored, compensation being made for their detention. Sometimes what is termed a civil embargo is employed. In strictness this applies to subjects only, and consists in the arrest or detention of vessels belonging to the nation imposing the embargo, found in its local waters, as a measure of internal safety (y). This may take place in order to prevent the spread of intelligence as to the condition of a country, or prior to the exercise of *jus angarie*, or in order to protect one's own trade against improper restrictions imposed by foreign nations.

Retortion consists in treating the subjects of another State in the same way as that State has treated one's own subjects. Thus, a tax imposed by one State to the prejudice of the subjects of another State, might be met by a similar course of conduct on the part of the latter. It is commonly laid down that retortion only extends to imperfect rights or mere rights of comity, and not to rights the violation or withholding of which would afford a *casus belli*.

Reprisals consist in the adoption of measures of retaliation; they are not confined to similar measures or to imperfect rights. They are sometimes said to be either general or special; but between the former kind of reprisals and open war there seems to be no real distinction. General reprisals may, therefore, be considered as a mere

(x) The matter was further complicated by the fact that, prior to the Treaty of Amiens, 27th March, 1802, Demarara had been in the possession of the English; but Sir W. Scott re-

fused to allow this consideration to affect his judgment: see p. 250 of the report.

(y) See Stephen's Commentaries, vol. ii., p. 515.

preliminary to or concomitant of war (z). Thus in 1854, on the outbreak of war between Great Britain and Russia, a British Order in Council was issued providing that general reprisals should be granted against "the ships, vessels, and goods of the Emperor of All the Russias and of his subjects, or others inhabiting within any of his dominions." Special reprisals, on the other hand, were measures resorted to, with a view to vindicate an injury committed against an individual subject or subjects, for which justice had been plainly denied or unreasonably delayed without, however, entering upon a state of open war (a). In Great Britain it was the custom in such cases for the Sovereign to issue letters of marque or reprisal; these were issued either to the individual or individuals injured, or to the armed forces or agents of the State. But in modern times the issue of letters of reprisal to private individuals has become obsolete, and with this much of the old learning on the subject has become inapplicable. Even in modern times, however, instances occur of special reprisals, or measures of retaliation short of general war, being resorted to by the State itself, with a view to enforce compensation for wrongs done to its subjects. In this case reprisals are either negative, where the State to which the injured party belongs, refuses to fulfil some obligation, or suspends the operation of certain treaties till justice is done. This was the expedient resorted to by Prussia in the case of the Silesian loan in 1752, although the position she took up is now commonly regarded as having been unjustifiable (b). Or reprisals may be positive in their character, in which case they generally take the form of a seizure of the persons or the property of subjects of the offending State, more usually the latter. In 1834, President Jackson, in his message to Congress recommended the adoption of reprisals on the part of the United States against France, observing that it was a well-settled principle of the International Code that where one nation owed another a liquidated debt, which it refused or neglected to pay, the aggrieved party might seize property belonging to the other State or its subjects, sufficient to pay the debt, without giving just cause of war . . . He then proceeded as follows :—"I recommend that a law be passed, authorizing reprisals upon French property, in case provision shall not be made for the payment of the debt at the approaching session of the French Chambers; such a measure ought not to be considered by France as a menace; she ought to look upon it as the evidence only of an inflexible determination on the part of the United States to insist on their rights; the French Government, by doing what is just, will

(z) Mr. Hall, on the other hand, states that the only reprisals now resorted to are general reprisals, meaning that reprisals are now resorted to only by the State itself, and are not per-

mitted or granted to particular individuals. See *International Law*, p. 368.

(a) See Phillimore, III. 21.

(b) See p. 144, *infra*.

be able to spare the United States the necessity of taking redress into their own hands, and save the property of French citizens from that seizure and sequestration which American citizens have so long endured without retaliation or redress; if she should continue to refuse it and if, in violation of the Law of Nations, she should make the reprisals on our part an occasion of hostilities against the United States, she would but add violence to injustice and could not fail to expose herself to the just censure of civilized nations" (c). Even this form of reprisals, however, would, in modern times and as between more powerful States, probably lead to war. Consequently this form of redress is now resorted to chiefly where the offending State is a minor Power, whom the injured State wishes to coerce without giving occasion to the misery and the suffering caused by actual war. Thus in 1840 the British Government issued reprisals against the kingdom of the Two Sicilies, in consequence of the infraction of the Treaty of 1816, and of the injury thereby caused to British subjects. In pursuance of the directions issued on that occasion, a number of Neapolitan vessels were captured by the British fleet, and a hostile embargo was also laid on all vessels in the ports of Malta that bore the Sicilian flag. That this was not intended to bring about a state of war may be gathered from the fact that the British Minister was instructed to remain at Naples. The French Government, however, mediated, and amicable relations were restored. Another form of reprisals, also resorted to in similar cases, consists in laying an embargo on the vessels and goods of the offending State in its own ports. An account of this form of reprisals and of pacific blockade will be found in the appended note to the case of *Don Pacifico* (d).

SILESIAN LOAN.

Temp. 1752.

[*DE MARTENS' CAUSES CÉLÈBRES*, VOL. II. p. 97.]

Case.] In 1744, war broke out between Great Britain on the one side, and France and Spain on the other.

For more than a year Great Britain in no way interfered with the commerce of Prussian subjects. Towards the end of 1745, the latter, who had hitherto only engaged in commerce on their own vessels and for their own account, commenced to load entire cargoes on their ships on account of France, while they

(c) See Phillimore, III. 43.

(d) See p. 148, *infra*.

made use of neutral vessels of other nations to carry their own merchandise. Thereupon several Prussian ships, loaded with planks for France, were captured by the English and subsequently condemned. By the end of 1748, the English had captured eighteen Prussian vessels and thirty-three other neutral ships chartered either wholly or in part by Prussian subjects. By way of reprisal, the King of Prussia confiscated certain funds, which had been lent by English subjects on the security of the revenues of Silesia, and which he had bound himself to repay by the Treaties of Breslau, Berlin and Dresden, 1742.

Discussion and Opinions.] It was contended on behalf of Prussia, (1) that the arrest of the ships was contrary to the Law of Nature and of Nations, under which the only privilege accruing to England, was, to permit her war ships to ascertain that there was no contraband on neutral vessels sailing for Spain or France; (2) that the British authorities had acted illegally in capturing Prussian vessels returning laden from France, and in taking them into English ports and requiring proof that the goods on board belonged to Prussian subjects; (3) that the capture of the thirty-three other neutral vessels with Prussian goods on board was illegal; (4) that the goods confiscated were not contraband according to the declaration of two English ministers; (5) that the English courts had, in these circumstances, no jurisdiction over neutral property; (6) and that the King of Prussia was entitled to utilize the funds in his hands in order to indemnify his own subjects, even though the funds were hypothecated to British subjects.

The matter was submitted by the British Government to a commission consisting of the judge of the Supreme Court, the King's Advocate-General in Civil Courts, the Procurator-General, and the Solicitor-General (e). In their opinion on the matter they laid down, as generally received and

(e) These are the terms used by De Martens in his account of the case. Presumably the members of the Com-

mission consisted of one of the judges, the Advocate-General, the Attorney-General, and the Solicitor-General.

recognized principles of International Law, the following propositions:—(1) That when two Powers were at war, each Power had the right of capturing the vessels and effects of the other met with on the high seas, although property ascertained to belong to neutrals could not be made prize, so long as they preserved their neutrality. Hence it followed: (2) that enemy goods on neutral vessels were liable to seizure, and (3) that neutral goods on enemy ships should be restored. (4) Further, contraband, though belonging to neutrals, was good prize; (5) before appropriation there must be condemnation; (6) the only tribunal competent to condemn was the Court of the captor; (7) all proofs in the matter should, in the first instance, be taken from the vessel seized. (8) Finally, the Law of Nations permitted reprisals in two cases only:—(a) in the case of a violent wrong directed and supported by the sovereign authority; and (b) in the case of a denial of justice by all the tribunals and the Sovereign himself in matters admitting of no doubt.

As to the contention raised on behalf of Prussia, that enemy goods were free on neutral ships, the English commissioners reported that the contrary principle was too well established to be open to doubt. As to the seizure by the English of goods alleged to be Prussian and not contraband, it appeared that none of the goods seized really belonged to Prussia. With regard to the character of contraband a mere verbal declaration of any minister, as to what was contraband, could not have the force of a treaty. As to the contentions founded on the freedom of the sea, even those who maintained this proposition in its widest extent, granted that when two nations were at war they had the right to seize one another's property on neutral ships. As to the reprisals formerly made by Great Britain against Spain, in that case the right of the former to compensation had been admitted, the amount fixed and payment promised by a convention; reprisals, it is true, had followed on the non-observance of the convention, but these were only general reprisals, and no debts due to Spanish

subjects or effects in British territory belonging to them, had been seized. In the present case the King of Prussia had given his word of honour to pay a debt due to private individuals. This debt was negotiable and a great part of it might have been transferred to subjects of other Powers. It would be difficult to find a case where a debt owing to private individuals had been seized by way of reprisal. In addition to this the debt should have been paid off in 1745, whereas Prussia's complaints commenced only in 1746.

In reply to the report of the English Commissioners it was again urged by Prussia that it was contrary to the Law of Nations to capture a neutral vessel on account of a presumption or suspicion of its having enemy goods on board, or to condemn the goods as prize merely in default of proof that they belonged to neutrals. If enemy goods on neutral vessels were liable to seizure so much discussion would arise that there would be no liberty of commerce so long as any two nations of the world were at war. Most of the commercial nations of Europe had adopted the maxim of free ships free goods, and that rule, together with the rule of hostile ships hostile goods, had become a maxim of the Law of Nations. From the declaration of Lord Chesterfield that, notwithstanding that there was no treaty with Prussia, Prussia would be favoured by England in the matter of navigation as much as any other nation, it followed that Prussia was entitled to demand the observance of the principle free ships free goods and hostile ships hostile goods, and was consequently entitled to demand satisfaction for the violation by Great Britain of this principle. As to the question of the King of Prussia's action in regard to the Silesian Loan, it was affirmed by the Prussian Government, that what was due by or to the Sovereign or Government of a nation was also due by or to the subjects, and conversely, what was due by or to the subjects of a nation was also due by or to their Sovereign or their Government; it was hence concluded that the debt due to Prussia wiped out a portion of the Silesian Loan, and it was not by way of

reprisals, but by way of compensation, that the King of Prussia was entitled to retain part of the loan in his hands. In reply to the contention that the loan had strictly become payable before the Prussian claims were made, it was pointed out that when a loan was made at interest the debtor was never censured for not having paid off the loan on the day fixed, especially when the creditor had not demanded it. As to the possibility of part of the loan having been transferred, the transferees must be deemed to have taken it subject to equities.

The matter was finally settled by the Treaty of Westminster, 16th Jan., 1756, whereby in consideration of Prussia agreeing to pay off the loan according to the original contract, Great Britain undertook to pay Prussia 20,000*l.* in discharge of all claims.

The Silesian Loan : De Martens, *Causes Célèbres*, Vol. II., p. 97.

The principles laid down by the British Government in the above case, on the subject of the rights and liabilities of neutral trade, may be said to have prevailed, except where modified by treaty, until the Declaration of Paris, 1856 (*f*). The principles also laid down by the British Government in regard to reprisals and the injustice of confiscating private debts to meet public claims, met with universal approval, and may be said to represent the existing principles of International Law on the subject.

CASE OF DON PACIFICO.

Temp. 1850.

[ANNUAL REGISTER, 1850, p. 281.]

Case.] M. Pacifico was a Jew born at Gibraltar, but in April 1847, resident at Athens. It was then customary in Greece for the people to burn an effigy of Judas Iscariot at Easter time, but in 1847 the police at Athens were ordered to prevent

(*f*) A complete account of these principles will be found on pp. 293, 294, *infra*.

the ceremony. The mob, attributing the order to interference by or on behalf of the Jews, attacked M. Pacifico's house and plundered it. M. Pacifico claimed over 26,000*l.* as compensation for the damage occasioned by the outrage.

In spite of the fact that M. Pacifico's claim should, in the first instance at least, have been brought before the Greek tribunals, the British Government intervened and required the Greek Government to make compensation. The Greek Government replied that the authorities had used every effort to stop the consummation of the act, and to deliver the authors of it up to justice, and that according to the municipal law both of Greece and other European nations, as well as the requirements of international comity, M. Pacifico ought first to have instituted an action for damages against the authors of the transaction before the civil tribunals.

On the failure of the Greek Government to make compensation, the British Admiral, in the first instance, was instructed to prevent any Greek public vessel from putting to sea; but in pursuance of subsequent instructions he also laid an embargo on all Greek merchant-vessels in Greek ports, and captured and detained such as were found upon the sea. The matter was referred to Baron Gros, a mediator despatched by the French Government, but his mission was at first unsuccessful. Ultimately, however, a convention was drawn up between the two Governments, by which the claim of M. Pacifico was referred to certain commissioners. These, after investigating his claim, awarded him 150*l.*, and the dispute thus terminated.

Case of Don Pacifico, Annual Register, 1850, p. 281.

The reprisals resorted to by the British Government in this case assumed a somewhat anomalous character, namely the laying of a hostile embargo on Greek vessels in Greek ports, in addition to the capture and detention of those found on the sea; a measure partly akin to embargo proper, and partly to pacific blockade.

With regard to the justice of the proceeding, opinions differ. The

action of the British Government was censured by the House of Lords, but sanctioned by a majority of the House of Commons. It also gave rise to some protest on the part of other Powers. The cardinal point of the English case was that the state of the Greek courts at the time would have rendered it futile to have recourse to them. Nevertheless, as Sir R. Phillimore justly remarks, nothing but overwhelming evidence on this point could have justified the departure from the rule alike of comity and of International Law, that in cases of this kind justice ought first to be sought at the hands of the municipal tribunals of the State in which the outrage took place. The gross exaggeration of M. Pacifico's claim also tends to show that the British Government acted somewhat rashly. It is not improbable that there were other motives inspiring the action of the British Government that have been lost sight of.

Akin to this method of coercion, is that of pacific blockade. This consists in the blockade of part of the territory or coast line of a State as in actual war, without, however, having recourse to other hostile measures. It is used either to prevent the violation of a state of peace, or to prevent the departure of a squadron or the introduction of troops, while an opportunity is at the same time given to the government of the place to explain its intentions.

This form of coercion has been adopted on several occasions during the present century by one or other of the great maritime Powers, as a means of extorting redress from less powerful States. It seems to have first been resorted to in the year 1827, when England, France, and Russia blockaded the coasts of Greece, with the view of coercing Turkey. Similar measures were threatened in 1880 against Turkey for nonfulfilment of the Treaty of Berlin, but the measure was rendered unnecessary by the success of the Dulcigno demonstration off the Albanian coast. This was merely a species of moral coercion, each power stationing ships of war off the coast with instructions not to take any active steps.

In 1884 a blockade of a somewhat ambiguous character was declared by France against China. On the 20th of October 1884, Admiral Courbet declared a blockade of all the ports and roads between certain specified points of the Island of Formosa. The French Government, whilst disavowing the character of a belligerent and claiming to retain the privilege of coaling its fleet at Hongkong, nevertheless proposed to treat neutral vessels as subject to capture or condemnation for breach or attempted breach of the blockade. The British Government protested against this on the ground that Admiral Courbet had not enough ships to guard the whole coast, and that it was therefore a violation of the principle of the Declaration of Paris, 1856, according to which blockade to be binding must be effectual. It further declared that the contention of the French Government,

that a pacific blockade conferred on the Power imposing it a right to capture and condemn vessels of other Powers for attempting to violate the blockade, was contrary to the well-established principles of International Law. It was, further, officially stated in the House of Commons that the British Government had refused to recognize the blockade of Formosa as a pacific blockade (*g*).

In 1886 a blockade of Greece was undertaken by the fleets of Great Britain, Austria, Germany, Italy, and Russia, in order to compel that country to abstain from making war upon Turkey. The British instructions were to detain every ship under the Greek flag coming out of or entering into any of the blockaded ports or harbours, and to prevent them from communicating with any ports within the limits of the blockaded coast. This blockade was not enforced as against the vessels of other nations, and certain saving provisions were made in regard to cargo belonging to the subjects of other nations found on board Greek vessels.

With regard to the legal character of pacific blockade, it seems likely that this species of coercion will become a recognized part of the Law of Nations ; but at the present time it cannot be pronounced a definitely accepted institution. If it is proclaimed against all vessels, then the nation proclaiming the blockade, arrogates in time of peace rights of interference which have hitherto been accorded only in time of war. If it is not enforced against other ships than those of the offending nation, then it lacks one of the chief requisites of a valid blockade proper, viz., that it must be enforced as against all vessels (*h*). In such case, however, it would seem to partake less of the character of a blockade than of a hostile embargo laid upon the vessels of the offending nation within its own ports and adjoining seas. In this character its adoption might prove of great advantage, as providing an effective means of restraint short of war, in case of minor States. The moral sentiment of civilized nations might be relied on to prevent this form of coercion from being abused.

(*g*) See statement of Lord E. Fitzmaurice in House of Commons, April 1,

1885. See also p. 304, *infra*.

(*h*) See p. 308, *infra*.

*DECLARATION OF WAR.***THE "ELIZA ANN."***Temp.* 1813.

[1 Dods. 244.]

Case.] During war between Great Britain and the United States, three American ships were captured by the British in Hanoë Bay, and sent home for adjudication. A claim to the ships and cargoes was made by the Swedish Consul, on the ground that the captures were made within Swedish territory, and that Sweden was at the time a neutral State. The state of things actually prevailing was this:—the conduct of Sweden had for some time previously been of a very unfriendly character in regard to Great Britain; a declaration of war had in fact been issued by the Swedish Government, but it was unilateral only; on this ground it was contended that the two countries could not be considered in a state of war.

Judgment.] Sir W. Scott, in his judgment, held that this contention could not prevail, and that war might exist without a declaration on either side. A declaration of war by one country was not a mere challenge to be accepted or refused at pleasure by the other. It proved the existence of actual hostilities on one side at least, and put the other party also into a state of war, though he might perhaps think proper to act on the defensive only. On this and other grounds the claim of the Swedish Consul was rejected.

The Eliza Ann, 1 Dods. 244.

In connection with the subject of declaration of war, two questions suggest themselves. One is, whether a nation is justified in commencing actual hostilities without a formal declaration of war, or at least without giving notice to the nation intended to be assailed. The other is, from what moment must the incidents of war be deemed to have attached in respect to individual subjects and property of either State.

The former, in modern times at least, appears to be a question of mere theoretical interest. The universal practice of maintaining resident ambassadors, and the fact that war generally ends a long series of negotiations, together with the rapid circulation of intelligence by the press, all contribute to render it improbable that a nation would now be taken unawares. Moreover, the cosmopolitan character of modern trade and commerce would induce a nation, in the interests of its own subjects, to forbear from entering on hostilities prematurely or trying to take its adversary unawares. Moreover, when once a state of war exists, the only remedy that an aggrieved nation would have against another for entering on war without a declaration, would be exhausted ; whilst the authority in favour of a formal declaration of war being necessary, prior to the commencement of hostilities, is far too slender, to render it likely that such an act would arouse any hostile action on the part of other nations.

With regard to the modern practice on the subject of issuing declarations of war, it seems that the earlier wars of this century were almost invariably commenced without declaration or notice. Thus the United States began the war with Great Britain, in 1812, without notice of any kind. France instituted a blockade of the coast of Mexico, and thus began the war of 1838, without any notice. The United States again, in 1846, entered on the war with Mexico without notice. But in the later wars of the century, hostilities seem to have been generally preceded by a formal declaration or by a manifesto issued by one of the belligerents. Thus the Crimean War between Great Britain and Russia, in 1853, was preceded by every possible formality. The Franco-Prussian War of 1870 was preceded by a declaration handed by M. Benedetti to Count Bismarck. The Russo-Turkish War of 1877 was announced by a formal despatch handed to the Turkish Chargé d'Affaires at St. Petersburg, although the Russian troops appear to have entered Turkish territory some hours before this. The hostilities, however, that broke out in 1884 between France and China, were commenced and continued without any formal declaration. In this case France, it is true, refused to admit that there was a state of war, but this was a mere political manoeuvre, that altogether failed to obscure the actual relations that existed between the two countries. It would, therefore, seem that as a matter of policy, though not of obligation, a formal declaration of war is now commonly made.

It is also customary for a belligerent State to issue a proclamation to its own subjects and a manifesto to neutrals, although these may be issued after hostilities have actually commenced. In regard to neutrals a manifesto ought to be issued by each belligerent, and this appears to be the common practice. If no such manifesto is issued, neutral obligations and liabilities will attach as from the time when the neutral has actual notice of the

war. It is, therefore, to the interest of the belligerents, as well as of the neutrals, that a proclamation or manifesto announcing the outbreak of war should be issued. This will then serve to fix the date at which neutral liabilities commence.

With regard to the second question, it is clear that according to the view adopted by the English Courts, the incidents of war will attach from the date on which the actual hostilities are commenced or decided on, even though there has been no declaration of war, or a declaration by one party only. As was remarked by Sir Robt. Phillimore, in the case of the *Teutonia* (i), war may exist in fact, so as to affect the subjects of the belligerent States, either on a unilateral declaration or even without a declaration. In the case of the *Nayade* (4 C. Rob. 258), Lord Stowell held that where one nation had committed acts of aggression in regard to another, and the latter had exhibited a submissive demeanour with the view of avoiding actual war, yet if the former had refused to accept such submission and had persisted in her attack, a state of war must be deemed to have existed, with all the consequences that attached to such a state of things (ii).

EFFECTS OF OUTBREAK OF WAR.

BROWN v. THE UNITED STATES.

Temp. 1814.

[8 CRANCH, 110.]

Case.] On the outbreak of hostilities between Great Britain and the United States, the United States authorities effected a seizure of some timber, which was the property of a British subject, but found within the United States jurisdiction. Proceedings were taken for its confiscation as prize of war. In the lower Court a sentence of condemnation was pronounced. On an appeal being brought, the Supreme Court considered fully the effect of the existence of war, upon British property found within the United States at the commencement of hostilities.

Judgment.] It was assumed throughout that war gave to a

(i) *Vide* p. 162, *infra*. (ii) The nations referred to were France and Portugal.

belligerent a right to take possession of and confiscate the property of the enemy wherever found. The mitigations of the rule which modern policy had introduced might affect the exercise of the right, but could not impair the right itself. If the Sovereign chose to bring the right into operation, the judicial department must give effect to his will. With regard, however, to the effect of a declaration or of the existence of war, alone, on enemy property found within the jurisdiction, the Court, after a review of the principal writers on the *jus belli*, came to the conclusion that, though the existence of war gave a right to confiscate, yet it did not of itself, and without more, operate as a confiscation of the property of an enemy. Hence it was held that a United States Court had no power of condemnation, in default of some expression of will to that effect on the part of the State. The sentence of condemnation pronounced by the Court below was, therefore, reversed by the Supreme Court, on the ground that there was no legislative act authorising the confiscation.

Brown v. The United States, 8 Cranch, 110.

This case is cited in relation to the subject of the treatment of persons and property of one belligerent found within the territory of the other on the outbreak of war.

With regard to persons, the practice seems to have grown up at a comparatively early date, of allowing enemy subjects to quit belligerent territory with their effects on the outbreak of war. Originally, indeed, the privilege seems to have been confined to foreign merchants (*k*). Thus in England, as early as the fourteenth century, it was provided by the Statute of Staples (27 Ed. III. st. 2), that on the outbreak of war foreign merchants should have forty days within which to depart the realm with their goods, with an extension of time in case of necessity. A similar practice seems to have been adopted in other countries. In later times, the privilege of safe withdrawal within a certain period, ranging from six months to a year, became very commonly a matter of express treaty provision. Finally it became a generally recognized principle that subjects of either belligerent, whether merchants or not, found

(*k*) Though this class was indeed, in early times, almost the only class likely to be affected.

within the territory of the other, should be at liberty to depart freely, within a period reasonably sufficient for the arrangement of their affairs, subject to a possible exception in the case of persons whose detention might be a matter of great political or military necessity. Modern practice appears to be even more liberal, inasmuch as the custom has sprung up of allowing enemy subjects to continue their residence during good behaviour. By Act of the United States Congress, 1798, the President is authorized in case of war to direct in what cases and upon what security the subjects of any hostile nation shall be permitted to remain in the United States. By the same Act those withdrawing are to be allowed such reasonable time as may be consistent with public safety, for the recovery, disposal, and removal of their goods, and for departure.

This is also, occasionally, a matter of express stipulation by treaty. Thus, by the Treaty of 1795, between Great Britain and the United States, it was provided that in the event of war the subjects of either country should have the privilege of remaining and continuing their trade so long as they behaved peaceably and committed no offence against the laws (*l*).

Where such permission is expressly or impliedly given it would seem to follow that such persons are entitled to the same privileges as other resident aliens. But in Great Britain it has been held in *Alcinous v. Nigreu (m)*, that an alien enemy, even though allowed to remain in British territory, cannot, without express licence from the Crown, maintain an action in the English Courts during the continuance of the war.

Apart from treaty, moreover, the right to expel alien enemies still remains, and may rightly be exercised under circumstances of political or military necessity. On the outbreak of the Franco-Prussian War of 1870, permission was at first given by the French Government to subjects of the enemy to remain in France or in any French colony, so long as their conduct furnished no reason for complaint; but any new admission into French territory was made a subject for special permission, which was only to be exceptionally granted; thirty days were allowed to enemy ships within which they were to quit France with the privilege of safe conduct; vessels bound to French ports, with goods on French account, laden before the declaration of war, were to be at liberty to enter and discharge their cargoes, with the privilege of safe conduct on their return voyage. On the 17th of September, however, a decree was issued ordering enemy subjects to quit French territory within three days, unless specially authorized to remain.

With regard to enemy property, we have seen from the leading

(*l*) See Hall, p. 392.

(*m*) See p. 171, *infra*.

case that the Supreme Court of the United States was clearly agreed that the outbreak of war gave the Sovereign a right to confiscate such property, although it went on to hold that the mere declaration or existence of war did not of itself render such property subject to confiscation. This may fairly be said to represent the existing law on the subject.

When the citizens of a hostile State are allowed to remain, the question of confiscation of property is scarcely likely to arise. The express or implied permission to stay would involve, as an almost necessary consequence, the according of the same general protection to their property, as that afforded to other domiciled aliens. If ordered to quit the belligerent country, then by modern usage and sometimes also by express treaty provision, alien enemies would be entitled to a reasonable time for withdrawal, and within such time they would doubtless be privileged to collect and take with them such part of their effects as they could, or failing that to dispose of them to other persons. Subject to these exceptions, or so far as advantage may not be taken of these privileges, the principle laid down in *Brown v. The United States* may still be said to obtain; in other words, such property becomes liable to confiscation and may be confiscated if the State sufficiently declares its intention. Thus, during the American Civil War, the Congress of the Confederate States enacted that all property of whatever nature held by alien enemies since 21 May, 1861, except public stocks and securities, should be sequestered. The Attorney-General of the Southern States expressed the opinion that all persons domiciled within the enemy States became subject to the provisions of this enactment; but the application of the enactment in question, to merchandize in which British subjects were interested, led to a protest by the British Government (n). Although in default of treaty a belligerent would still be entitled to forfeit enemy property, yet such a course would open up the road to reprisals and would also be contrary to the policy of civilized nations. The humane policy of modern times and the common interests of both belligerents would probably render it unlikely to be applied. Immoveable property would probably in any case be left unmolested (o). Even property belonging to the other belligerent State itself ought to be exempt from interference, unless it were of such character as to render it likely to prove serviceable in war.

It was until lately the practice of Great Britain to seize as prize all vessels and cargoes belonging to alien enemies found or coming within her territorial waters or harbours on the outbreak of war; but even this appears to have been given up. On the outbreak

(n) See Parl. Accounts and Papers, 1862, vol. lxii; North America, No. 1, p. 108.

(o) Though the rents might possibly be sequestered during war.

of the Crimean War both Great Britain and France allowed Russian merchant vessels, then in British or French ports, six weeks to complete their cargoes and depart unmolested. The same exemption was extended to all Russian merchant vessels that, prior to the date of the Order in Council, had sailed from any foreign port for any British port, such vessels being allowed to enter and discharge cargo and return unmolested to any port of their own country not under blockade. The same policy was pursued by France on the outbreak of the Franco-German War in 1870, the privilege of free departure with safe conduct being granted to enemy ships then in French ports, and the privilege of entry and departure being also granted to enemy vessels that had begun to load goods on French account at any time before war was declared (p). Germany went still farther and issued a declaration altogether exempting private vessels and cargoes belonging to the enemy from capture. This declaration was, however, subsequently rescinded, and was probably only intended to force the French Government into a similar course.

Subject to this exceptional practice, however, the right of seizure would still be exercisable in respect of enemy vessels or property found or coming within the territory of the other belligerent after the outbreak of war. In the case of the *Johanna Emilie* (Spinks, 14), 1854, Dr. Lushington laid down that it was competent for any person to take possession of, and to assist the Crown to proceed against, enemy property found in any part of the United Kingdom, unless it were protected by licence or declaration from the Crown.

By a Postal Treaty of 30th August, 1890, between Great Britain and France, it is provided that where the packets employed by the postal authorities of either country are owned by the State or are specially subsidized for the postal service, such packets shall not be liable to seizure, embargo, or *arrêt du prince*, and that in the event of war between the two countries, such packets shall be at liberty to continue their navigation without being molested, until either Government notifies a discontinuance of postal communication, in which case they are to be at liberty to return to their own ports.

(p) This operated somewhat harshly on neutrals, inasmuch as German vessels bound for neutral ports remained liable to capture after the date of the

commencement of the war, whilst German vessels bound to French ports with goods on French account were exempt from capture.

THE RUSSO-DUTCH LOAN.*Temp.* 1854.

[PARLIAMENTARY DEBATES, 3RD SERIES, VOL. CXXXV., 1096.]

Case.] After the conclusion of war in 1814, Great Britain, in consideration of being allowed to retain certain Dutch colonies and dependencies in her possession at the close of the war, undertook to pay a moiety of the loan which had been contracted by Russia in Holland during the war. By the Convention of the 19th of May, 1815, embodying the terms of this arrangement, it was agreed that the payments on the part of Great Britain should cease if the sovereignty of the Belgic provinces should pass from the King of the Netherlands; but it was at the same time provided that the obligation of payment should not be affected by the outbreak of war between the parties. On the subsequent separation of Belgium from Holland in 1830 a new Convention was entered into between Great Britain and Russia, whereby, after reciting that the object of the earlier Convention was, on the one hand, to afford Great Britain a guarantee, that Russia would on all questions concerning Belgium identify her policy with what Great Britain deemed best for the maintenance of the balance of power in Europe, and on the other hand to secure to Russia the payment by Great Britain of a portion of her old Dutch Debt, Great Britain engaged, subject to the consent of the British Parliament, to continue the payments stipulated in the Convention. On the outbreak of the Crimean War a motion was made in Parliament to the effect that Great Britain should renounce her obligation to make any further payments, on the ground that Russia had violated the general arrangements of the Congress of Vienna.

The motion was, however, rejected upon the ground, among others, that "Great Britain being at war with Russia, was bound by a regard to her national honour to be more than ever jealous of affording the slightest ground for the accusation

that she wished to repudiate debts justly contracted with the Power which was for the time being her enemy" (q). In consequence of this, the interest on the loan was paid throughout the war to the agents of the Russian Government.

The Russo-Dutch Loan, Parliamentary Debates, 3rd Series, Vol. CXXXV., p. 1096.

It will be observed that in this case there was a specific engagement that payment should not cease in the event of war. But even in default of such specific engagement, it would seem that the rule has now grown up, that war does not terminate or even suspend the liability of a belligerent State to pay interest on its debts, whether these have been incurred to alien enemies as individuals or to the other belligerent State. In the case of public loans, subscribed for by individual capitalists, both the negotiable character of the bonds usually issued, and the necessity of maintaining the public credit of the State, contribute to lend force to this principle. The case of a loan by one State to another, is now less likely to occur, but even in such a case, a regard for the national honour would probably outweigh both the emergency of the moment and the natural desire to avoid adding to the enemy's resources.

Loans to foreign States have not infrequently been guaranteed by third Powers. Thus in 1855 Great Britain and France guaranteed the interest on a public loan of £5,000,000 effected by Turkey. In 1885 a convention was entered into between Great Britain, Germany, Austria, France, Italy, Russia, and Turkey, whereby the six great Powers undertook to guarantee the interest on a loan of £9,000,000 to be raised on behalf of the Egyptian Government. If, in such cases as these, war should break out between the State effecting the loan and the State guaranteeing it, it is scarcely open to doubt that the latter would still hold itself bound by its engagements.

(q) See Twiss, vol. ii. p. 114.

WOLFF v. OXHOLM.*Temp.* 1817.

[6 MAULE & SELWYN, 92.]

Case.] The plaintiff Wolff was a native of Denmark naturalized and resident in England, and had carried on business here in partnership with others. Oxholm, a Danish subject resident in Denmark, was indebted to the partnership. Proceedings were taken at Copenhagen to recover the debt, a cross-suit being also instituted to recover a counterclaim. While these suits were pending, in 1807, war broke out between Denmark and Great Britain, and an ordinance was thereupon made by the Danish Government, whereby all debts due to English subjects were sequestrated and ordered to be paid to the Danish Treasury. Oxholm accordingly paid the amount to the Danish Government. After the war proceedings were taken in England for the recovery of the debt, the question in the case being as to the effect of the Danish order of confiscation.

Judgment.] A verdict in favour of the plaintiff was pronounced by the Court on the broad ground that, apart from other circumstances in the case, the Danish ordinance was a violation of the principles of International Law. It was stated in the judgment, that the right of confiscating debts, contended for on the authority of Vattel, was not recognised by Grotius, and was altogether impugned by Puffendorff and other writers; that such confiscation was not general at any period of time, and that no instance of it, except the ordinance in question, was to be found for something more than a century. On the ground, therefore, that the ordinance was not conformable to the usage of nations it was held that the payment which had been made by the defendant to the Danish Government constituted no defence to the action.

Wolff v. Oxholm, 6 Mau. & Sel. 92.

Phillimore, in commenting adversely on this decision, points out that in the course of the judgment no allusion was made to the high authority of Story and the American tribunals; that it was, moreover, a decision against a foreigner for obeying the law of his own country, and that this law was sanctioned by the authority of eminent jurists and judges. On these grounds the learned author suggests that if the occasion should present itself, the authority of the case might not improbably be overruled. No doubt the right of confiscating debts is strictly a corollary of the right of confiscating the property of an alien enemy found within the territory of the State. In the American case of *Ware v. Hylton* (8 Dallas, 199), which arose out of an Act of Confiscation passed by the Legislature of Virginia in 1777, it was recognized as a general principle of International Law that one State being at war with another was at liberty to confiscate loans previously made to its own subjects, by subjects of the other State; but it was at the same time admitted, even at this early date, that a usage had grown up amongst European nations under which this right of confiscating private debts was usually waived. By lapse of time this usage has gained in strength, and in the present day the practice of confiscating private debts has undoubtedly fallen into abeyance. The practice now obtains, almost universally, of treating debts due to alien enemies as merely suspended by the war and as revived on the restoration of peace. What was at the outset a mere act of comity and convenience appears to have been converted into a well recognized rule.

THE "TEUTONIA."

Temp. 1871 & 1872.

[L. R. 3 A. & E. 394; 4 P. C. 171.]

Case.] In April, 1870, a Prussian brig was chartered to carry a cargo of nitrate of soda from South America to England for orders. She arrived at Falmouth on the 10th of July, and the next day she received instructions to sail for Dunkirk. She arrived off Dunkirk on the 16th, but the state of the tide did not permit her to enter, and she could not have done so until the afternoon of the 17th. On the 16th she was boarded by a pilot, who told the master that war had broken out between France and Prussia. The brig thereupon returned to the Downs, and anchored there on the 17th. On the 18th the

master received from the owner of the brig instructions not to go to Dunkirk. The brig put into Dover the next day. On that day France declared war against Prussia. A suit was instituted by the consignees of the cargo for damages for non-delivery at Dunkirk. It was admitted by the plaintiffs, that after the formal declaration of war the ship was not bound to go to Dunkirk. The plaintiffs relied mainly on the fact that war was not declared until the 19th.

Judgments.] Sir Robert Phillimore, in giving judgment, laid down that war might exist *de facto*, so as to affect at least the subjects of the belligerent States, either without a declaration on either side or before a declaration or with a unilateral declaration only. In view of the facts the learned Judge held that war had either in fact broken out or was at any rate so imminent as to render Dunkirk an unsafe port for a Prussian vessel, that the vessel, moreover, could not have entered the port without incurring the penalties of trading with the enemies of her country, and that the master was therefore excused from all liability for refusing to enter (r). Another question that arose was whether the master was entitled to any freight on delivery of the goods at Dover. This also was decided in his favour.

An appeal was taken to the Judicial Committee of the Privy Council. The Judicial Committee dissented from the opinion of Sir Robert Phillimore that the ship could not have entered Dunkirk in safety on the 16th, holding that what occurred before the 19th did not amount in fact to an actual outbreak of war; but they agreed that the master, when he was informed by the pilot of war having broken out, was entitled to pause and take a reasonable time to make further enquiries,

(r) The terms of this judgment do not appear to be altogether consistent. In one place, the learned judge states that the "Teutonia" would have incurred a double risk in proceeding to Dunkirk, viz., the risk of seizure by the French, and failing that, the risk of condemnation by her own courts for trading with the enemy (see p. 411 of Report); in another place (p. 414), it

is stated that in this particular case the law of France would not have prevented the unloading at Dunkirk. In view of the French proclamation (referred to *supra*, p. 156), the latter statement appears the more accurate of the two. In the Privy Council, however, stress was laid exclusively on the liabilities the master might have incurred under his own municipal law.

and that he did not exceed the limits of a reasonable time in so doing. If the master had entered Dunkirk, and it had turned out that war had been declared (as he was informed), he would have entered it with notice that he was entering an enemy's port, and might thus have exposed the ship to condemnation and himself to severe penalties when he returned to his own country. As to a contention, that a distinction arose from the fact that the [ship alone had been exposed to danger, and that a breach of contract, therefore, had been committed in regard to the non-delivery of the cargo, it was held that no such distinction existed. The appeal was consequently dismissed.

The Teutonia, L. R. 3 A. & E. 394; 4 P. C. 171.

This case is cited as illustrating the effects of war on a contract between the subject of a belligerent and the subject of a neutral, where the former has agreed to perform it in what has become an enemy's country. Under such circumstance the belligerent is entitled to refuse to proceed with the performance of the contract, so far as this would take place in his enemy's country. As a matter of fact it would seem that under the French Orders issued on the outbreak of war, the "*Teutonia*" might have proceeded to Dunkirk without risk of confiscation; but this was merely due to a peculiar incident of the war, and in no way qualifies the general principle deducible from the case. From it we may gather, therefore, that the outbreak of war discharges the liability of a belligerent to perform his contract if either (1) performance in the enemy's country would subject him to the risk of confiscation there, or (2) would expose him to penalties in his own country. The case also raises the question as to the commencement of war between two countries. On this subject the Judicial Committee fully admitted the principle that war may exist without actual declaration, and that a party may under such circumstances claim any immunities consequent on war, to which he may be entitled either by the general law or under his contract. The point on which the Judicial Committee differed from Sir R. Phillimore was only as to whether in fact war could be said to have existed between the parties on the 16th of July. Subject to this difference, the principles laid down by Sir R. Phillimore as to the effect of an actual or impending outbreak of war upon a contract, such as existed in the present case, were substantially affirmed.

GRISWOLD v. WADDINGTON.

Temp. 1818.

[15 JOHNSON'S REPORTS, 57.]

Case.] Joshua Waddington and Henry Waddington were partners, the former being an American citizen residing in New York, and the latter a British subject resident in London. Proceedings were taken to recover a balance of account arising out of transactions between N. L. & G. Griswold and the Waddingtons during the war between the United States and Great Britain. It was sought to make H. Waddington liable.

Judgment.] Spencer, J., in giving judgment, stated that it appeared to him that the declaration of war did of itself work a dissolution of all commercial partnerships between British subjects and American citizens. By dealing with either party no third person could acquire a legal title against the other. In answer to an objection of want of notice of the dissolution, he stated that the declaration of war was of itself the most authentic and monitory notice.

Griswold v. Waddington, 15 Johnson's Reports, 57.

The effect of war is to put an end to all non-hostile intercourse between the subjects of the two belligerent States. Existing contracts are extinguished or suspended according to their nature; future contracts are forbidden to be entered into during the war(s). Among the contracts extinguished is that of partnership, the reason being the impossibility for partners to take up the business after the conclusion of the war at the point at which it was abandoned on the outbreak. In *Esposito v. Bowden* (7 E. & B. 763), it was held that a contract of charterparty, under which an English subject had chartered a neutral ship to bring a cargo of corn from Odessa, was avoided by the outbreak of war between Great Britain and Russia, on the ground that it would be illegal for a British subject (not domiciled in a neutral country) to ship a cargo from an enemy's port, even in a neutral vessel, without a licence from the Crown. In *Furtado v. Rogers* (3 B. & P. 191), it was held that a contract of

insurance entered into by a British subject in respect of a foreign vessel, before the outbreak of war between Great Britain and the country to which such vessel belonged, would not entitle the assured to indemnity against the capture of his vessel by Great Britain on the outbreak of war; but that the contract having been valid in respect of other risks, and having been entered into in time of peace, no return of the premium could be claimed by the assured. Other contracts, however, which in their nature admit of delay in performance, are merely suspended, and revive after the termination of the war. In *Ex parte Boussmaker* (13 Ves. 71), an application was made by an alien enemy for leave to prove under the bankruptcy of a British subject, the debt having been contracted before the war. It was held that if the contract had been actually made whilst the creditor was in the position of an alien enemy, it would have been void, and the present application must have failed; but that inasmuch as the contract had been made before the war, it would revive on the return of peace; and that in view of this, the dividend due on the creditor's proof ought to be reserved for him, with liberty to receive payment of the amount when peace might be restored. Both these cases are subject to the rule that the Sovereign who has the right to proclaim war, may by Order in Council suspend the effect of such proclamation for a time so as to allow the performance of subsisting contracts within that time (f).

TRADING WITH THE ENEMY.

THE "HOOP."

Temp. 1799.

[TUDOR'S LEADING CASES, 921; 1 C. ROB. 196.]

Case.] During war between Great Britain and Holland at the end of the last century, the "Hoop," a British vessel, sailed on a voyage from Rotterdam nominally to Bergen, but really to a British port. The cargo consisted of flax, madder, Geneva and cheeses. The ship was captured for having been engaged in illegal trading. Condemnation of the cargo was resisted on the ground that the claimants, who had previously

(f) See Anson, p. 192.

been engaged in an extensive trade with Holland, had, after the irruption of the French into Holland, but before the present war with Holland itself, obtained special Orders in Council permitting them to continue their trade. They were subsequently informed by the Commissioners of Customs of Glasgow, under the opinion of the law advisers of the latter, that no further Orders in Council were necessary, and that all goods brought from the United Provinces could in future be entered without any such permit. The claimants consequently caused the goods in question to be shipped at Rotterdam for their account, documenting them ostensibly for Bergen, in order to avoid the enemy's cruisers. Under these circumstances it was urged that the case was entitled to great indulgence.

Judgment.] Sir W. Scott, in giving judgment, stated that by a general rule in the maritime jurisprudence of this country, all trading with the public enemy, unless with the permission of the Sovereign, was interdicted, and this might be affirmed to be a general principle of law in most of the countries of Europe. In this country the Sovereign alone had the power of declaring war and peace, and of removing in part the state of war by permitting commercial intercourse. Hence a subject of the enemy could not sue in British Courts, unless under particular circumstances, such as his coming under a flag of truce, which *pro hac vice* would relieve him from the enemy character. A state in which contracts could not be enforced could not be a state of legal commerce. Upon these and similar grounds it had been the established law of the Court that trading with the enemy, except under a royal licence, subjected the property involved to confiscation. Sir W. Scott then proceeded to cite numerous cases on the subject, which showed that the rule had been rigidly enforced. Thus, he remarked, that where under an Act of Parliament a homeward trade from the enemy's possessions had been authorized, but protection had not been accorded to an outward trade to the same, even though the latter was intimately connected with that homeward trade and almost neces-

sary to its existence,—property employed in such outward trade had been condemned. In order to take the case out of the rule, there must be legal distinctions and not mere considerations of indulgence and compassion, such as were put forward in the present case. There did not appear to be any such legal distinctions, and the claim for restitution was therefore rejected.

The Hoop, Tudor's Leading Cases, 921 ; 1 C. Rob. 196.

British subjects are forbidden to contract with alien enemies, or with any persons domiciled in the enemy's territory, or employed in his service, except under licence from the Crown. A uniform current of English precedents was referred to by Sir W. Scott in support of the opinion, that trading with the enemy, except under licence, subjected the property involved in such trading¹ to confiscation. A similar doctrine prevails under the municipal law of most other countries. "No rule of law," says Phillimore, "is, in fact, better established by the universal usage of the community of States." It applies not merely to trade carried on by sea but also by land. Thus a trading with Scotland at a time when that country was in a state of enmity with England, was held to be illegal in an English subject (*u*). All contracts entered into in performance of or as incidental to such trading are also illegal (*x*). This rule, however, is subject to some exceptions:—(1) It seems that contracts entered into by British subjects detained abroad, with alien enemies for the supply of necessaries, may be enforced against them on the return of peace (*Antoine v. Morshead*, *infra*, p. 178); (2) If an enemy subject is allowed to continue to reside in Great Britain with the licence of the Crown, it seems to follow that he will be entitled to enter into contracts and that such contracts will be enforceable in the same way as contracts with alien friends (*Wells v. Williams*, *Ld. Raym.* 282), though mere residence apart from licence would apparently not be enough (*Alcinous v. Nigreu*, *infra*, p. 171); finally (3) Alien enemies who are detained as prisoners of war in Great Britain, under the protection of the Crown, may enter into and enforce certain personal contracts, unless the Crown interferes to prevent them (*Maria v. Hall*, 2 B. & P. 236).

It will be seen that in the case of the *Hoop*, the illegal trading consisted in importing into England property purchased during war

(*u*) Per Lord Mansfield in *Mason v. Gost*, 1 D. & E. 85, apparently on the

authority of a case cited in *Roll. Abr.*

(*x*) See p. 178, *infra*.

in the enemy's country. The principles laid down by Sir William Scott, however, cover also the case of property consigned to the enemy's country, or even to places under the temporary occupation of the enemy; the transmission of such property being considered as a trading with the enemy. In the case of the *Bella Guidita* (cited in the *Hoop*), a Venetian vessel had been chartered by British merchants to carry a cargo of provisions from Ireland to Grenada, which was formerly a British possession, but which had been temporarily occupied by the French; it appeared that neither Grenada nor other islands similarly captured were considered by the French Government as having fully acquired the character of French possessions; nevertheless, the judgment of the Vice-Admiralty Court of Barbadoes condemning the cargo was affirmed on appeal.

At the time of the Crimean War a question arose as to how far trading with the enemy might be carried on through the medium of neutral houses. The question was proposed by merchants interested in the Russian trade, as to whether Russian produce brought over the frontier by land, and then shipped in British or neutral vessels, would be subject to confiscation. Lord Clarendon, after remarking that the question turned upon the ownership of the property, stated that if shipped at neutral risk, or after having become *bonâ fide* neutral property, it would not be liable to condemnation whatever its destination; but if it still remained enemy property, notwithstanding it was shipped from a neutral port and in a neutral ship, it would be liable; it would also be liable to condemnation if it proved to be British property, or property shipped at British risk, and to have been involved in trade with the enemy; but if there had been a *bonâ fide* and complete transfer of ownership to the neutral, the goods would not be liable, even though they might have come to that neutral market from the enemy's country either over land or by sea (y).

Trading with the enemy may, however, be carried on with the permission of the Government whose subjects are so engaged. Where one State is at war with another, such permission may be given by either Government to its own subjects; but when allied States are pursuing a common cause against a common enemy, there is an implied obligation incumbent on each of the co-belligerents not to do anything to defeat the common object. For either Government in such case, without the consent of the other, to allow its subjects to carry on an uninterrupted trade with the enemy would be injurious to the common cause, and would violate an implied term of bond of alliance (z).

Trading with the enemy embraces all trading between persons

(y) See *Times Newspaper*, March 25, 1854.

(z) See Wheaton, by Boyd, p. 433.

domiciled in the country of one belligerent, and persons domiciled in the country of the other, irrespective of the nationality of such persons. On the other hand it is generally recognized that a subject of one belligerent who continues domiciled in a foreign neutral country, does not incur liability by trading with the country of the other belligerent. In Great Britain this principle was recognized in the case of *Bell v. Reid* (1 M. & S. 726), and also in the case of the *Danous* (cited in 4 C. Rob. 255) (a). As will be gathered from the cases of the *Rapid* and the *Gray Jacket*, cited below, liability for illegal trading extends even to the case of a subject bringing back his property from the territory of the other belligerent, unless this is done either on the outbreak of war or immediately afterwards, and has for its sole object the putting of the property outside the control of the hostile power.

The inhabitants of a State which is merely under the protection of one of the belligerents, are not, it seems, infected with an enemy character *quoad* the other, and are therefore at liberty to carry on commerce with the enemy. Thus, by the Treaty of Paris, 1815, the Ionian Islands were constituted a free and independent State under the exclusive protection of Great Britain. In the case of *The Ionian Ships* (2 Spinks, Adm. & Eccl. 212), it was held that the trade carried on with Russia during the Crimean War by the inhabitants of the islands was not illegal, they not being either British subjects, allies in the war, or enemies of Russia (b).

It follows almost necessarily from the rule of non-intercourse that the subjects of one belligerent cannot sue or be sued in the municipal Courts of the other during the continuance of the war. In the leading case, Sir Wm. Scott laid down, that under nearly every system the character of alien enemy carried with it a disability to sue; that this was alike a rule of English law and of the Law of Nations; and that no enemy subject, therefore, could sue in a British Court, unless under circumstances that *pro hac vice* discharged him from the character of an enemy, such as his coming under a flag of truce, a pass, or some other act of public authority that put him in the King's peace *pro hac vice*, otherwise he was totally *ex lex*.

In Great Britain the rule is that no action can be maintained either by or in favour of an alien enemy (*Brandon v. Nesbitt*, 6 T. R. 23). A defendant, in such a case, may defeat the action by showing that the plaintiff was born in a foreign country, now at enmity with this country, and that he came here without letters of safe conduct or licence from the Crown (*Casseres v. Bell*, 8 T. R. 166). In *Poultton v. Dobree* (2 Camp. 168), it was decided that a licence could not be implied from mere residence, unless this was expressly sanctioned by

(a) See p. 104, *supra*.(b) See p. 12, *supra*.

the Government after the commencement of hostilities. Nevertheless, in the American case of the *Society for the Propagation of the Gospel v. Wheeler* (2 Gallison, p. 127), it was pointed out by Story, J., that the plea of alien enemy was not favoured by the common law, and that it was necessary, in order to support a motion in arrest of judgment on this ground, to negative every presumption that could arise of safe conduct or licence, either to the corporation or its members. In *Alcinous v. Nigreu* (4 E. & B. 217), an action was brought in an English Court, during war between Great Britain and Russia, for work and labour rendered by the plaintiff to the defendant; it was objected that the plaintiff was an alien born in Russia, an enemy of the Queen, and residing here without licence; Campbell, C.J., in giving judgment to the effect that the action was not maintainable, stated that though the contract which had been entered into before the war was valid, and might be enforced when peace was restored, yet by the law of England so long as hostilities prevailed it could not be sued upon.

THE "RAPID."

Temp. 1814.

[8 CRANCH, 155.]

Case.] In this case it appeared that a United States citizen had purchased a quantity of English goods in England before the outbreak of war between Great Britain and the United States, and had deposited them on a small island belonging to the English. War having been declared, the owner dispatched the ship "Rapid" to the island in order to bring home the goods. The latter were taken on board, but on the return voyage the "Rapid" was captured by a United States privateer and brought in for adjudication, on the ground of trading with the enemy. The question was raised whether this was such a trading as would properly subject the property to condemnation.

Judgment.] Johnson, J., in delivering the opinion of the Court, laid down that, in a state of war, nation was known to nation only by its armed exterior, every individual of the one nation must acknowledge every individual of the other nation

as his own enemy, because the enemy of his country. In the law of prize a hostile character attached to trade with the enemy independently of the character of the trader pursuing it; a citizen or ally might be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarked. As to a contention on behalf of the claimant that there was no trading in the eye of the law, the learned Judge laid down that the object of the rule was to cut off all communication between individuals of belligerent States, and that any intercourse inconsistent with actual hostility was the very offence against which the operation of the rule was directed. The claimant had no right to leave the United States for the purpose of bringing home his property from an enemy country, much less could he claim a right to bring in goods the importation of which was expressly prohibited. The decree of the Court below condemning the cargo was affirmed.

The Rapid, 8 Cranch, 155.

This case is cited both as illustrating another aspect of the subject of trading with the enemy, and as showing the rigid enforcement of this principle by the United States Courts. In the case of the *Gray Jacket* (5 Wallace, 842), a vessel was captured by a United States cruiser, whilst engaged in carrying the property of the master, a United States citizen, from the territory of the Confederate States during the American Civil War. A decree of condemnation, pronounced in the Court below, was affirmed on appeal, the Court laying down in judgment that the liability of the property was irrespective of the *status domicilii*, or of the guilt or innocence of the owner; if it came from enemy territory, it bore the impress of enemy property; if it belonged to a loyal citizen of the country of the captors, it was nevertheless as much liable to condemnation as if owned by a citizen or subject of the hostile country, or by the hostile Government itself; the only qualification of these rules was, that where upon the breaking out of hostilities, or as soon after as possible, the owner escaped with such property as he could take with him, and in good faith thus early removed his property with the view of putting it beyond the dominion of the hostile power, the property in such case would be exempt from the liability that would otherwise attend it. In the case of the *Ocean* (5 Rob. 91), Sir William Scott held it would be

going further than the law required, to decree the confiscation of the property of a British subject who had settled in Holland, but who, on the breaking out of war between Great Britain and that country, had taken steps to remove himself and his property, and had only been prevented from doing so by forcible detention on the part of the local authorities. Again in the case of the *Dree Gebrader* (4 C. Rob. 234), the same learned judge observed that where the transaction was *bonâ fide* and directed only to the removal of property which the accident of war had lodged in the belligerent country, it was entitled to be treated with some indulgence. Nevertheless, in a subsequent case, it was intimated that such an indulgence was not to be understood as relaxing the general necessity of obtaining a licence, wherever property was to be removed from the enemy's country.

LICENCES TO TRADE.

USPARICHA v. NOBLE.

Temp. 1811.

[13 EAST, 322.]

Case.] During war between Great Britain on the one hand and France and Spain on the other, the plaintiff, a Spaniard domiciled in Great Britain, obtained the King's licence for a voyage on a neutral ship. The ship was captured by two French cruisers and condemned. This action was on a policy of insurance for the loss.

Judgment.] Lord Ellenborough, in giving judgment, laid down that the legal result of the licence was that the commerce itself was to be regarded as legalized for all purposes necessary to its protection. The Crown could exempt any person and any branch of commerce in its discretion from the disabilities and liabilities arising out of a state of war, and its licence for such purpose ought to receive the most liberal construction. For the purpose of the licence the person licensed should be regarded as an adopted British subject, and the trading as British trading. Judgment was, accordingly, given for the plaintiff.

Usparicha v. Noble, 13 East, 322.

Licences to trade, in time of war, are sometimes granted to subjects of either belligerent. In Great Britain the power of granting such licences is vested in the Crown, though like most other powers of the Crown, it really resides in the responsible executive. In the United States a similar power is vested in the President. Thus under an Act of Congress of 1861, whilst power was vested in the President to proclaim a cessation of all commercial intercourse with the rebel districts under pain of forfeiture, an exception was nevertheless set up to the effect that the President might permit intercourse with such part or parts as he might think fit. But such licences can only be granted by or under the authority of the chief of the executive. In the case of the *Sea Lion* (5 Wall. 630), a vessel had been captured by a United States cruiser, whilst on a voyage from Mobile, which was then under blockade, to Havana; protection was claimed by reason of a licence or permit which had been granted by the special agent of the United States Treasury and Acting Collector of Customs; but it was held by the Court that such a permit was of no validity, that the President alone could authorize such a trade, and that no regulations had been issued by him under which such a permit could be issued. So in *McKee v. U. S.* (8 Wall. 163), a licence from the commanding Officer of the United States forces was held to be nugatory, on the ground (amongst others) that such an officer had no authority to grant a licence to trade.

Such licences extend sometimes to all persons, sometimes only to a particular individual; sometimes to all articles, except of course contraband, sometimes only to particular articles; sometimes to all places except those under blockade, sometimes only to particular places. Such licences are construed strictly and are invalidated by misrepresentation. In the case of the *Vriendschap* (4 C. Rob. 96), where the claimant, a British subject, held a licence to carry to the enemy's port certain enumerated articles, it was held that this would not cover other articles not enumerated, notwithstanding an alleged ulterior destination to a neutral port. But in the case of the *Vrouw Cornelia* (Edw. 349), a licence to bring in a cargo in one vessel, was held sufficient to protect the same cargo in two vessels, although one of them had only an attested copy of the licence; Sir W. Scott stated in judgment that in such cases the Court would not limit the parties to a literal construction of the licence, and that it would be sufficient if they showed that under the difficulties of commerce they came as near as they could to the terms of the licence.

THE "NEPTUNUS."*Temp.* 1807.

[6 C. Rob. 403.]

Case.] During war between Great Britain and Holland, a ship belonging to a subject of Sweden, one of the allies of Great Britain, was captured by a British cruiser whilst on a voyage from a Swedish port to Amsterdam, with a cargo of pitch and tar. She was brought in for adjudication, and at the trial the case turned on the effect of a modified permission to trade with the common enemy in innocent articles, given by the Government of an ally in the war.

Judgment.] Sir W. Scott in his judgment, stated that as between allies it must be taken as an implied, if not an express contract, that one State should not do anything to defeat the common object and interest. If one State admitted its subjects to carry on an uninterrupted trade with the enemy, the consequence might be to supply aid and comfort to the enemy, which might prove very injurious to the prosecution of the common cause and to the interests of its ally. It was not enough to show that one State allowed this practice to its own subjects; but it must be shown, either that the practice was of such a nature as could in no manner interfere with the common operations, or that such trade had the allowance of the allied State. There being no such circumstances in the present case, the goods were pronounced liable to condemnation.

The Neptunus, 6 C. Rob. 403.

This case is cited as illustrating the application of the rule of trading with the enemy as between allies.

THE "VENUS."*Temp.* 1803.

[4 C. Rob. 355.]

Case.] The "Venus," a British vessel, had gone to Marseilles under a cartel for the exchange of prisoners. The master, after discharging the prisoners, took on board three Jews, together with some goods which were made subject to a distinct freight. The vessel was subsequently captured by a British cruiser whilst on her voyage to Port Mahon, and was sent home for adjudication on the ground of having traded with the enemy.

Judgment.] Sir W. Scott, in giving judgment on the case, refused to say that, if the master had taken on board a few articles for his own petty profit, such an act on his part would have subjected the property of the owner to confiscation; but he added that, where goods were taken on board in such quantities and in such manner as to call for the remonstrance of the officers of the ship, it was too much to say that the offence was imputable only to the master. Cartel ships were subject to a double obligation, due to both countries, not to trade, and it was only with the consent of both governments that vessels engaged in that service could be permitted to take in any goods whatever. The ship was therefore condemned on the ground of illegal trading.

The Venus, 4 C. Rob. 355.

A cartel ship is one employed for the carriage by sea of exchanged prisoners. She sails under a safe conduct or licence given by the commissary of prisoners in the enemy's country. She is free from molestation both whilst going to the enemy's country to land or fetch prisoners, and whilst returning thence after having taken the exchanged prisoners on board. She is not, however, entitled to protection whilst on a voyage from one port of her own country to another with the object of fetching prisoners to be returned to the enemy. In the cases of the *Daifio* and *Soaring* (3 C. Rob. 139), Sir W. Scott laid down that although a cartel ship was entitled to protection

eundo et redeundo, yet a ship intended to be employed as a cartel ship, was not protected whilst going from one port of her own country to another, with a view to being so employed.

As laid down in the leading case, such a vessel also loses her immunity when she departs from the strict line of her special purpose, as when she receives merchandise on board.

In the case of *La Gloire* (5 C. Rob. 198), the privilege of a cartel ship was extended to a French ship which was engaged in carrying to their own country certain French prisoners who had been released by the British on parole not to serve again.

POTTS v. BELL.

Temp. 1800.

[8 TERM REPORTS, 548.]

Case.] The plaintiff in this case had effected a policy of insurance on some madder then lying at Rotterdam. The madder was to be shipped on board a vessel called the "Elizabeth," and to be consigned to the plaintiff's agents at Hull. The consignment was made and the policy effected after the outbreak of war between Great Britain and Holland. On her voyage to Hull, the "Elizabeth" with her cargo, was captured by a French vessel (Great Britain being also at war with France) and subsequently condemned. The plaintiff then sought to recover on the policy.

Judgment.] Lord Kenyon, C.J., in giving judgment, stated that although there was only one direct authority on the subject, yet this very fact showed that the point had not been since disputed. He therefore held that the policy was invalid as being in furtherance of illegal trading, it being an accepted principle of the Common Law that trading with an enemy without the king's licence was illegal in British subjects.

Potts v. Bell, 8 Term Reports, 548.

This case is cited as showing the effect of illegal trading in English law, on contracts made in furtherance thereof. In this case the insurance was in favour of a British subject and against the

risk of hostile capture, but it was nevertheless held to be vitiated by the fact that it was in furtherance of an illegal trade with the enemy. In *Bell v. Reid* (1 M. & S. 726), however, it was held that a policy of insurance entered into by a British subject domiciled in a neutral State, in regard to a ship owned by him, but trading to an enemy port, was valid, and could be recovered on.

Insurances of enemies' property against British capture are null and void as being contrary to public policy; and in every policy of insurance there is an implied term that the insurance shall not extend to cover any loss from the capture of property by British vessels in the event of an outbreak of hostilities (*Furtado v. Rogers*, 3 B. & P. 191). In *Brandon v. Nesbitt* (6 T. R. 23), an action was brought on a policy of insurance on goods on board an American ship, consigned to Bayonne, during war between Great Britain and France; the policy had been effected by a British subject, but on behalf of a French principal; it was held that, although the contract was in form between British subjects, and although on a balance of account, the proceeds would have gone to indemnify the British agent against sums due to him by his French principal, yet the insurance was void as being on behalf of an alien enemy.

ANTOINE v. MORSHEAD.

Temp. 1815.

[6 TAUNT. 237.]

Case.] This action was brought upon five bills of exchange, drawn on the defendant by his father, a British subject who had been detained in prison in France during the war between that country and Great Britain. The bills were made payable to British subjects, who had likewise been detained prisoners, and were by them indorsed to the plaintiff, who was a French subject and a banker at Verdun, and were finally accepted by the defendant. A verdict having been found in favour of the plaintiff, a rule nisi was moved for on behalf of the defendant, on the ground that the contract had been made with one who was at the time an alien enemy, and was, therefore, not merely suspended by the war, but absolutely void.

Judgment.] Gibbs, C.J., in giving judgment, after remarking that the bills were not drawn by an alien enemy, stated that two principles appeared from the cases cited on behalf of the defendant, namely (1), that a contract made with an alien enemy in time of war, of such a nature as to endanger the security or to be against the policy of the country, was void ; and (2), that however valid a contract might have been originally, yet if one of the parties to it became an alien enemy he could not sue. In the latter case, the Crown might, during the war, lay hands on the debt ; but if it did not do so, then on the return of peace the rights of the contracting alien were restored and he might himself sue. Passing to the question as to whether the bills came into the plaintiff's hand by a good title, the learned Chief Justice held that, in the circumstances of the case, the indorsement to the plaintiff had conveyed to him a legal title in the bills, on which the king might have sued in the time of war, and this not having been done, the plaintiff might sue after peace was proclaimed. The rule was accordingly refused.

Antoine v. Morshead, 6 Taunt. 237.

This case points to a modification of the ordinary rules as to contracts with alien enemies. In general all contracts made during the war with alien enemies are void. Thus, in regard to bills of exchange, it was held in *Williamson v. Patterson* (7 Taunt. 439), that a bill drawn by an alien enemy on a British subject resident in Great Britain, and indorsed during war to another British subject voluntarily resident in the hostile country, could not be sued on even after peace, because it was illegal in its inception. Nevertheless, in *Antoine v. Morshead*, it was decided that bills drawn by one British subject in favour of another British subject, both being prisoners of war in the enemy's country, and the drawee being also resident in Great Britain, could be validly indorsed over to an alien enemy, and that the latter could sue on them after the return of peace. The effect of this decision would appear to be, to enable alien enemies, under certain conditions, lawfully to provide for the wants and necessities of prisoners detained in the enemy country, and to sue on such contracts on the return of peace.

With regard to the position of prisoners of war in England, in the case of *Maria v. Hall* (2 B. & P. 236), a French prisoner of war sued in

an English Court for compensation for services rendered in assisting to work a ship home from the West Indies and an application to stay proceedings was refused, on the ground that it was competent to a prisoner of war to sue on a contract for wages.

RANSOM CONTRACTS.

RICORD v. BETTENHAM.

Temp. 1765.

[3 BURR. 1734.]

Case.] In 1762, during war between Great Britain and France, the English ship "Syren," of which the defendant was master, was captured by the French privateer "Badine." The ship was released on the defendant giving a ransom bill for 300 pistoles to the plaintiff, the commander of the French privateer, and leaving Joseph Bell, the mate of the ship, as hostage. Bell died in prison. Subsequently the present action was instituted on the ransom bill.

Judgment.] It was urged on behalf of the defendant that there was no precedent for such an action; that the contract was void on account of the condition of the contracting parties, the plaintiff being at the time of the contract an alien enemy; and that inasmuch as the ransom bill was not an independent contract, the hostage alone was entitled to bring the action. These objections were, however, overruled, and judgment given for the plaintiff; presumably on the ground that such contracts were usually deemed valid amongst other nations, and that the hostage was merely left as collateral security (c).

Ricord v. Bettenham, 3 Burr. 1734.

Where a belligerent captures property at sea belonging to his enemy, which he is unable to take into port, it is the practice either

(c) The grounds of the judgment are not stated in the report.

to destroy the property, or to release it on a ransom bill being given by the master of the prize, a hostage being also left with the captor for the payment of the ransom. On the acceptance of the ransom bill, the vessel is exonerated from all liability to hostile capture by other ships belonging to the captor's country or his allies, provided she keeps to the course prescribed by the contract, and completes her voyage within the time limited by it. The contract itself insures only against subsequent belligerent capture, and not against the perils of the sea, so that the ransom is due, although the vessel be subsequently lost. If the ransomed vessel without justification exceeds the time allowed her, or deviates from her course, and is retaken *in delicto*, she will be liable to condemnation, the original captors taking the amount of their ransom bill, and the subsequent captors taking the residue of her value. If the captor, having the ransom bill or hostage in his possession, is himself taken by the enemy to whom the ransomed vessel belonged, the ransom bill will become part of the capture, and the obligation thereon to the original captor will cease.

The decision in the case of *Ricord v. Bettenham*, seems to accord with the rules adopted by most systems of municipal law which still allow the practice of giving ransom contracts. According to the practice of France and Holland, the captor, though an alien enemy, can in such case sue on the ransom bill. In the former country, on the return of the ransomed vessel, it is the practice of the Admiralty officers to seize and detain her till the ransom is paid (*d*).

But so far as English law goes, it has since been decided (*Anthon v. Fisher*, 2 Doug. 649, n.), that an alien enemy cannot sue in his own person even on a ransom contract. In the case of the *Hoop* (1 C. Rob. 201), Sir Wm. Scott remarked, that even in the case of ransom contracts, which were contracts arising *ex jure belli* and tolerated as such, an alien enemy was not permitted to sue in his own proper person, but payment was enforced by an action brought by the imprisoned hostage in the courts of his own country for the recovery of his freedom.

The practice of granting of or entering into ransom contracts is often prohibited by municipal law. Russia, Sweden, Denmark, and the Netherlands appear to forbid the practice altogether. On the other hand, the United States permit ransom contracts to be granted or entered into by their own vessels whether captors or captured (*e*). In Great Britain captors were formerly liable to a fine for granting ransom to their prizes except under circumstances of necessity; whilst British vessels captured by the enemy were also subject to penalties for entering into ransom contracts for their own release,

(*d*) See Pothier, No. 144.

(*e*) See Hall, note p. 460.

except so far as might be permitted by Order in Council. The English practice is at present governed by the Naval Prize Act, 1864 (*f*), sec. 45. By this section power is given to Her Majesty in Council to regulate and allow ransom contracts under such conditions as may be thought fit; such contracts, if made, are to be within the exclusive jurisdiction of the Court of Admiralty; whilst penalties are inflicted in case of the violation of such conditions.

In *Maissonaire v. Keating* (2 Gall. 325), the doctrine of ransom was applied by the United States Courts to the case of a neutral ship, which had been captured by one belligerent on the ground of carrying contraband to the other, but had been released on giving a ransom bill; Story, J., in affirming the validity of the ransom contract, laid down, that, inasmuch as the cargo had a hostile character and would in all probability have been liable to condemnation, even though owned by a neutral, the captor was entitled if he chose to accept a ransom in consideration of his relinquishing all interest and benefit in the property captured, and that the fact of the ransom being taken from a neutral made no difference.

CAPTURE IN WAR.

THE "VENUS."

Temp. 1814.

[8 CRANCH, 253.]

Case.] This ship and her cargo were the property of certain United States citizens who had settled in Great Britain, and were engaged in commerce there. The "Venus" sailed from Great Britain in 1812, before the outbreak of war between the United States and Great Britain could have become known to the shippers. In the course of her voyage she was captured by the United States privateer "Dolphin," and brought in for adjudication. The question in the case was, whether the property of the claimants, who were citizens of the United States, but who, at the same time, had become domiciled, settled in Great Britain and were engaged in commerce there,

(*f*) 27 & 28 Vict. c. 25.

—such property having been shipped before the owners had a knowledge of the war, but captured after the declaration of war,—ought to be condemned.

Judgment.] It was stated in the judgment that the writers on the Law of Nations distinguished between a temporary residence in a foreign country for a special purpose, and a residence accompanied by an intention to make it the party's domicile or permanent place of abode. In the latter case the domicile involved a consequent liability in the event of an outbreak of war. The Court found that the doctrine, both of the Prize Courts and Common Law Courts of England, was in harmony with these principles. It was therefore held that if a citizen of the United States established a commercial domicile in a foreign country, between which and the United States war afterwards broke out, his property, even though shipped before the declaration of war, would be liable to capture, his residence in the enemy country giving it a hostile character. The property was therefore condemned. The Court, however, only laid down the rule with reference to so much of his property as was connected with his residence in the enemy's country. The converse proposition was also adopted that if a belligerent subject acquired a commercial domicile in a neutral State, he would be considered a neutral by both belligerents in reference to his trade.

Marshall, C. J., however, dissented from the view entertained by the majority of the Court.

The Venus, 8 Cranch, 253.

Enemy character in time of war, so far as the liability of ships and goods to capture on the sea is concerned, is determined by various circumstances.

The primary test is domicile in the enemy's country. This may be a permanent domicile accompanied by naturalisation, or it may be a domicile involving merely a civil status, the national character or political status of the party remaining unaffected. In either case, the domicile will have the effect of imparting an enemy character, in the event of war breaking out between the country of the party's domicile and any other country. The case of the *Venus*

shows that this will be so, even though the war should be between the country of which the party was a natural-born subject and the country of his domicile. A domicile so acquired will have the effect of rendering both ships and goods liable to capture and condemnation by the other belligerent. The stringency with which this rule is enforced in time of war, may be gathered from a reference, made by Sir Wm. Scott in the case of the *Diana* (5 C. Rob. 60), to the case of Mr. Whitehill. From this it appears, that during war between Great Britain and Holland, an English subject arrived at St. Eustatius only a few days before the place was invested by Admiral Rodney's forces; it was held that, though a mere temporary sojourn in the enemy's country for the purposes of health or pleasure would not establish domicile or impart a hostile character, yet if a person went to a country with the intention of carrying on business there, he acquired a domicile as soon as he established himself, because the conduct of a fixed business necessarily implied an intention to remain permanently; in such a case, therefore, mere recency of establishment would not preclude the acquirement of a hostile character.

Permanent engagement in the civil or military service of the enemy will have the same effect.

Commercial domicile, or having a house of commerce in the enemy's country, will also render liable all property connected with that particular establishment, but in other respects the neutral character will remain unaffected if the party is actually domiciled in a neutral country (*h*).

The grant of a monopoly of trading rights, or the enjoyment of a concession bestowing an exceptional trading privilege, from the Government of an enemy State, will also imbue the grantee, even though he may be domiciled in a neutral country, with an enemy character, *quoad* property accruing to him under such monopoly or concession (*i*).

Possession of soil within enemy territory will also render liable the produce of the soil, so long as it remains in the hands of the owner, even though he be domiciled elsewhere (*j*).

Moreover, any vessel owned by a neutral but manned by an enemy crew, commanded by an enemy master, and employed in the trade of the enemy is regarded as an enemy ship. A vessel holding a pass from the enemy, or sailing under its flag, is regarded in a similar light. A somewhat curious exception to this rule was set up in the case of the *Palme* (*k*). In this case a vessel sailing under the flag of the North German Confederation, was captured by a French cruiser,

(*h*) See the case of the *Portland*, p. 62, *supra*.

(*i*) See the case of the *Anna Catharina*, p. 187, *infra*.

(*j*) See the case of the *Phœnix*, p. 186, *infra*.

(*k*) See Dalloz, 1872, Part. III., p. 94.

during the war between France and Germany, and brought in for adjudication; it appeared that the vessel belonged to Swiss owners, but that, as Switzerland had no maritime flag of her own, she sailed under that of the North German Confederation; under these circumstances the Conseil d'Etat reversed the decision of the inferior Court, and decreed restitution.

With regard to domicile, the broad principle underlying the case of the *Venus*, viz., that the property of all persons domiciled in the enemy's country, even though natural-born subjects of the belligerent effecting the capture, is liable to condemnation,—is indisputable. But the propriety of the decision, in view of the special facts of the case, has been questioned. It was suggested by Marshall, C.J., that where a merchant established himself for commercial purposes in a foreign country, he must be presumed to intend to remain there only so long as he could do so without violation of his duty towards his native country, and that when war broke out between the two countries, he must be presumed to intend to withdraw from the country of his adoption. However this may be, there is no doubt that if he continues in the enemy country, or delays his return, or if there are other circumstances rebutting this presumption, his property will become liable to capture.

A qualification of the rule laid down in the *Venus* is afforded by the case of the *Ocean* (5 C. Rob. 99). In that case a claim was made on behalf of a British-born subject, who had settled as a merchant at Flushing, but who, on the appearance of approaching hostilities, had taken means to remove himself and return to England; he had been prevented from removing personally by the violent detention of all British subjects who happened to be within the enemy's territory at the outbreak of the war; Sir Wm. Scott in giving judgment stated, that he thought it would, under the circumstances, be going farther than the principle of law required, to hold that the claimant by his former occupation and his constrained residence, had acquired a hostile character. A somewhat similar qualification of the ordinary rule is suggested in the case of the *Gray Jacket* (5 Wallace, 342) (1).

Where a hostile domicile is relinquished on the outbreak of war, the clearest proof is required by the Courts of the intent to abandon the former domicile, the onus of proof being on the party who sets up such change of domicile. From the case of the *Indian Chief* (m) it seems, however, that where the change is from an acquired domicile to a domicile of origin, less conclusive evidence of intent to abandon is required by the Court, than in cases where there is a relinquishment of the domicile of origin.

(1) See p. 172, *supra*.

(m) See p. 99, *supra*.

THE "PHOENIX."

Temp. 1803.

[5 C. ROB. 20.]

Case.] During war between Great Britain and Holland, the "Phoenix" was captured when on a voyage from Surinam to Holland, and brought in for adjudication. The cargo was claimed on behalf of persons resident in Germany, as being the produce of their estates at Surinam.

Judgment.] Sir William Scott, in giving judgment, laid it down as a fixed principle of the Court, that the possession of the soil impressed upon the owner the character of the country as far as the produce of the plantation was concerned, whilst this was being transported to any other country, whatever the local residence of the owner might be. In the present case the estates in question were acquired by descent, and as such they were by no means marked out to any favourable distinction. If they had been a late acquisition, there might have been room for the supposition that they had been acquired whilst the place was under British control, and that the owner had been induced by that circumstance to form an establishment there under the protection of the British Government. But having fallen by descent on these persons from their ancestors in Holland, these plantations must be considered to carry with them the disadvantages as well as the advantages attaching to the Dutch character. Being the produce of the claimant's own plantations in the colony of the enemy, the property must fall under the general law and be pronounced subject to condemnation.

The Phoenix, 5 C. Rob. 20.

This case illustrates the principle that property, which consists of the produce of estates situated in the enemy's country, is liable to condemnation as enemy property if, at the time of capture, it still remains in the hands of the owner of the soil. This decision was followed in the American case of *Bentzon v. Boyle* (*The Thirty Hogsheads of Sugar*, 9 Cranch, 191). In this case it appeared that the

island of Santa Cruz had originally belonged to Denmark, but had been taken possession of by the British forces. Bentzon, a Danish officer and proprietor of land there, withdrew from the island on its surrender and subsequently took up his residence in Denmark. He still retained his estates in the island, and his agent there shipped some sugar, the produce of the estate, on board a British ship to a commercial house in London on his account. The ship was captured by a United States cruiser during the war between the United States and Great Britain. The cargo was condemned. An appeal was brought against the condemnation, but the decree was affirmed. The Court, in its judgment, stated that the acquisition of land in Santa Cruz bound the claimant, so far as respected that land, to the fate of Santa Cruz, whatever its destiny might be the general commercial or political character of Mr. Bentzon could not affect the transaction; although incorporated so far as respected his general character with the permanent interests of Denmark, he was incorporated so far as respected his plantation in Santa Cruz with the permanent interests of Santa Cruz, and though as a Dane he was at war with Great Britain and an enemy, yet as proprietor of land in Santa Cruz he was no enemy, and could ship his produce to Great Britain in perfect safety; such produce must therefore be regarded by the United States as having a hostile character, and as liable to condemnation.

THE "ANNA CATHARINA."

Temp. 1802.

[4 C. ROB. 107.]

Case.] The "Anna Catharina" was a Danish vessel, and was captured in 1801 by a British cruiser whilst on a voyage from Hamburg to a Spanish port, with a cargo of linen, wines and cheese. War existed at the time between Great Britain on the one hand, and Spain and Holland on the other.

The cargo appeared to have been shipped under the following circumstances. In 1799 a contract was made between the Spanish Government of the Caracas and Mr. Robinson, a trader at Curaçoa, for the purchase by the latter of all the tobacco in the warehouses of the Spanish Government at Porto Caballo, La Guayra, and Guyana, payment to be made in flour, dry

goods, and specie. Messrs. Sontag & Co., of Hamburg, were entrusted by Robinson with the carrying out of this contract, Robinson taking one-third of the profits.

It was sought to condemn the cargo on various grounds. In the first place it was contended that, as Curaçoa had passed into the possession of the British Crown (*k*), the contract must be deemed illegal, as existing between a British subject and the enemy. It was also contended that the cargo having been shipped under a contract with the Spanish Government must be deemed Spanish property. Finally, it was alleged that the nature of the contract was such as to impress on the persons carrying it out the character of Spanish traders, and consequently to imbue them with a hostile character.

On the other hand, the property was claimed by Messrs. Sontag & Co. on the grounds that the property was really vested in them, in which case as neutral property it incurred no liability; that even if Robinson was to be regarded as a British subject, yet the contract not having been illegal in its inception could be validly adopted and carried out by a neutral; and lastly, that the goods could not be considered as the property of the Spanish Government, because, in the event of the Spanish Government not being willing to accept them they were to take "the chance of the market."

Judgment.] Sir W. Scott, in his judgment, after considering the nature of the contract between Robinson and the Spanish Government, which was really the basis of the whole adventure, held that the contract, though not illegal in its inception, yet became illegal when, by the British possession of Curaçoa, Mr. Robinson became a British subject; but he concluded that the liability of the property on this particular ground, viz., of being involved in an illegal trade with the enemy, would not have affected it in the hands of Messrs. Sontag & Co., on behalf of whom the claim was made.

(*k*) In 1800 Curaçoa was surrendered by the Dutch to the British. It was restored in 1802, recaptured by the

British in 1807, and finally handed over to the Dutch in 1817.

On the question, however, as to the hostile character of the property, Sir W. Scott, after reviewing the circumstances, held that as the cargo was going in time of war to the port of a belligerent, under a contract to become the property of the belligerent immediately on arrival, the property must be considered as being in the Spanish Government, and, therefore, as having a hostile character. He added that neither the fact of its being primarily consigned to Messrs. Sontag's agent, nor the possibility of the Spanish Government refusing the goods was sufficient to preclude this liability.

As to the further question whether the contract did not fix on Robinson and those claiming under him, the character of Spanish traders, Sir W. Scott held that a contract of this kind giving Robinson a monopoly of trading rights, taken in conjunction with the fact that he had a resident agent on Spanish territory for the purpose of carrying out the undertaking, did have the effect of imbuing him with a Spanish, and therefore a hostile character. As to Messrs. Sontag & Co., they had participated in the benefit of this contract, and had acted under arrangements made by Robinson, and they must therefore be deemed to take it subject to its legal consequences, among which was that of the liability of the cargo to condemnation in the event of its capture by an enemy of Spain.

On these grounds, therefore, viz., that the property must be considered as being in the Spanish Government, and that in addition to this the parties must be considered as trading in the character of Spanish merchants, the cargo was condemned, a claim for freight being refused on account of the prevarication of the evidence.

The Anna Catharina, 4 C. Rob. 107.

Some important principles may be deduced from this case. In the first place the seizure of the property illustrates the liability which enemy property was formerly under, even though found on board a neutral vessel; although this liability no longer exists as between the parties to the Declaration of Paris, 1856 (1).

(1) See p. 294, *infra*.

Next there is an important principle as to trading with the enemy. Sir Wm. Scott held that a contract existing between a British subject domiciled in a place which had passed into the possession of Great Britain, and a foreign Government at war with Great Britain, became illegal as involving trade with the enemy ; but he qualified this rule, by holding that this would not affect property shipped in pursuance of such a contract, after it had passed into the hands of a neutral.

Another principle deducible from the case is, that a contract giving any person a monopoly of trading rights within the country of an enemy, imbues such person with a hostile character, even though he be domiciled elsewhere. Sir Wm. Scott, indeed, added, " coupled with the fact that he had a resident agent on Spanish soil ; " but it would seem that this is almost a necessary incident of such a privilege.

Lastly, the case illustrates the liability of goods carried under a contract to become the property of the enemy, or of enemy subjects, on reaching its destination. On this subject the rule usually adopted is, that when goods are delivered by a consignor to the master of a ship, for carriage to the consignee, they are deemed to become the property of the consignee. In time of peace this rule may be modified by agreement. But in time of war the English and American courts will not generally recognise any modification of this rule as between a neutral consignor and an enemy consignee ; in their view property consigned under such circumstances to an enemy, is considered in the light of enemy property, and is therefore liable to capture and condemnation. The principle of the Declaration of Paris, 1856, that a neutral flag covers enemy goods, will have the effect of narrowing the application of this rule. Formerly a belligerent was entitled to investigate the character of goods found even on board a neutral vessel, and to condemn them, if for any reason they proved to have a hostile character, not in the sense of being contraband (in which case they would still be liable), but in the sense of being the actual or presumed property of an enemy. As between the parties to the Declaration of Paris, this is no longer the case, and to warrant their condemnation, the goods (not being contraband), must now not only belong to an enemy, but must be taken on board an enemy vessel, or whilst engaged in the enemy's trade. This, without overriding the rule indicated above, will yet render it of more limited application.

THE "VROW MARGARETHA."

Temp. 1799.

[1 C. Rob. 336.]

Case.] In this case a claim was made by a Mr. Berkeymyer of Hamburg, to a cargo of brandies, which had been shipped by Spanish merchants and consigned to a Dutch firm. The shipment took place in 1794, before the outbreak of war between Great Britain and Spain. The brandies were transferred to him *in transitu*, but before arriving at their destination war broke out, and both ship and cargo were captured and brought in for adjudication.

Judgment.] Sir W. Scott, in giving judgment, observed that although in time of peace, a transfer *in transitu* was perfectly permissible, yet where a state of war was existing or imminent, the property in goods must be deemed to continue till actual delivery in those parties in whom it was vested at the time of shipment. This arose out of the conditions of war, which entitled a belligerent to seize upon the goods of his enemy. If such a rule did not exist, all goods shipped in the enemy's country would be protected by transfers which it would be impossible to detect. He therefore recognized it as a rule of the Court, that property could not be converted *in transitu*. This rule, however, only became applicable on the outbreak of war, and had no application to transactions that took place during time of peace. In the present case the transfer *in transitu* having occurred before the war and in time of peace, must be adjudged according to the ordinary rules of commerce, and there being nothing to raise any suspicion as to its *bona fides*, the cargo must be restored to Mr. Berkeymyer.

The Vrow Margaretha, 1 C. Rob. 336.

Prior to the Declaration of Paris, 1856, the rule was, except where modified by treaty, that a belligerent might capture enemy property wherever found, whether on board a neutral or an enemy vessel. The liability of goods consigned by a neutral to an enemy has already been dealt with. The question here is as to the liability of goods consigned

by an enemy to a neutral. On this subject the rule of the English Prize Courts was that goods consigned by an enemy to a neutral were presumptively liable, unless the clearest evidence was furnished that the property in them had already become vested in the neutral consignee, and that the consignor retained no further interest in them other than the right to stop *in transitu* in the event of the consignee's insolvency. Assignments of goods *in transitu* by a belligerent to a neutral during war were, therefore, deemed bad unless the transferee had already taken possession of them, the probability of their being fraudulently intended being so great as to amount almost to a certainty. "If," said Sir W. Scott, "such a rule did not exist, all goods shipped in the enemy country would be protected by transfers which it would be impossible to detect." But transfers of goods *in transitu* made up to the time of the breaking out of hostilities, were *primâ facie* valid. Even in this case, however, they might become vitiated and the property liable to seizure and condemnation, if made in contemplation of war and with the view of protecting the property from possible capture by the belligerent. Thus in the case of the *Jan Frederick* (5 C. Rob. 128), property purchased *in transitu* from a Dutch subject by a neutral in contemplation of the outbreak of war between Great Britain and Holland was condemned, Sir Wm. Scott laying it down in his judgment that if the contemplation of war led immediately to the transfer, and became the foundation of a contract that would not otherwise have been entered into by the seller, and this was known to the purchaser, even though on his part there might be other concurrent motives, such a contract could not be held good; it was invalid on the same principle as a similar contract made in time of actual war; the object of both contracts was the same, viz., to protect the property from capture, or from the danger of capture when it was likely to occur; both were for the purpose of eluding a belligerent right either present or expected; both contracts were framed with the same *animus fraudandi*, and were justly subject to the same rule.

In the American case of the *Francis* (1 Gall. 444), goods had been consigned by a British subject to a United States firm. On the outbreak of war, the goods having been captured and brought in for adjudication, a claim was made by the American consignees on the ground that the property in the goods had become vested in them subject to their refusal to accept it, and that they had elected to take it prior to the capture of the ship. Story, J., laid it down as a general principle that the hostile character of goods (as enemy property) could not be altered by anything done *in transitu*, and that the property in the goods having been still in the shippers at the outset of the voyage, it could not be altered by any subsequent acts, and that the claim must therefore be rejected.

These rules still obtain, although as between the parties to the Declaration of Paris, their application will in future be limited by the exemption of enemy property other than contraband, found on board neutral vessels.

THE "SOGLASIE."

Temp. 1854.

[2 SPINKS, ECC. & ADM. 101.]

Case.] The "Soglasie" was originally a Russian vessel. On the 17th of May, 1854, during the Crimean War, she left Cronstadt with a cargo of wheat for Leith, where she arrived on the 22nd of June. On her arrival at Leith, the ship was seized as enemy property. It was contended that in February, 1854, the "Soglasie" had been sold to Mr. Johann Saraow, a Danish merchant, residing at Messina, when she assumed the Danish flag, and that in June, 1854, there had been a further sale to one Fischer, a merchant at Copenhagen, on whose behalf condemnation was resisted.

Judgment.] Dr. Lushington, after remarking that Mr. Saraow, as a merchant of Messina, was not entitled to the Danish character, went on to consider the evidence as to the employment of the vessel after the sale to him. As to this, it appeared that she had been constantly employed in the Russian trade, and that she continued in the same course after the sale, as before. Moreover, no evidence was furnished as to the payment of the purchase-money. There was, in fact, nothing to alter the original national character of the vessel or master, except the formal documents produced, and even these would not suffice according to Danish Law. The ship was therefore pronounced subject to condemnation as Russian property. No evidence being furnished with respect to the cargo, that likewise was condemned. In the course of the judgment, Dr. Lushington remarked that in the present case the transfer was *in transitu flagrante bello*, and all the authorities denounced such a transaction as illegal.

The Soglasie, 2 Spinks, Ecc. & Adm. 101.

The rule of the English Prize Courts on the subject of transfers of goods *in transitu* by a belligerent to a neutral in time of war, has already been stated. The present case is cited as illustrating the law relating to transfers of ships. Vessels owned by persons domiciled in the enemy's country, or in other ways incorporated in the enemy's mercantile marine (*m*), are necessarily liable to condemnation as enemy property. According to the practice of some States the fact of hostile ownership on the outbreak of war, fixes the liability of the vessel throughout the war, no transfer or sale of the vessel after this date being recognized. According to the practice of Great Britain and the United States, however, an out and out transfer to a neutral made *bonâ fide* and proved by the clearest evidence might be sustained, and in this event the vessel would not be subject to condemnation. In *Batten v. The Queen* (11 Moo. P. C. 271), the Privy Council decreed restitution of a vessel called the "Maria," which had originally been the property of a Russian merchant but which was alleged to have been sold to a Belgian firm shortly before the Crimean War, on the ground that a *bonâ fide* transfer had been shown, and that the ship had become neutral property at the time of her seizure. This principle would equally protect a *bonâ fide* transfer to a neutral made during the war, unless this occurred whilst the vessel was *in transitu*. In the latter case, the sale would be invalid, the rule being that when a vessel starts on a voyage having a particular national character, she cannot change it during the voyage. Even this, however, is subject to the modification, that although a vessel in such case may not have reached her original port of destination, yet the transitus will be held to have ceased, if she comes into the actual possession of a neutral transferee. Thus, in *Sorensen v. The Queen* (11 Moo. P. C. C. 141) a vessel was captured and brought in for adjudication as being enemy property; condemnation was resisted on the ground that, though originally Russian property, she had been sold *bonâ fide* and absolutely to a neutral, when the Crimean War was imminent; it was further shown that though the vessel was at the time of the sale on a voyage from Libau, an enemy port, to Copenhagen, a neutral port, yet that she subsequently arrived at the latter port and was taken possession of by the purchaser; under these circumstances it was held by the Privy Council (reversing the sentence of the Admiralty Court) that the sale, although made *in transitu*, was nevertheless valid, in view of the fact that before her seizure she had actually passed into the possession of the neutral purchaser.

(*m*) As to the criteria of enemy character in respect of ships, see p. 184, *supra*.

*BOOTY OF WAR.***THE BANDA AND KIRWEE BOOTY.***Temp. 1866.*

[L. R. 1 A. & E. 109; 35 L. J., N. S., ADM. 17.]

This was a case of booty of war and arose out of the extensive military operations undertaken by the British Government in India, for the suppression of the Mutiny, during the years 1857 and 1858. The case contains an elaborate statement of the doctrine of the English Courts in regard to distribution of booty of war, and incidentally touches on several important questions connected with prize of war. The facts are somewhat complicated. The following is a short summary of the more important facts and of the main principles embodied in the judgment.

Case.] Three great military divisions were organized for the suppression of the rebellion. One of these was under the direct command of Lord Clyde (then Sir Colin Campbell), the Commander-in-Chief in India. Another, called the Bombay Division, took the field under the orders of Sir Hugh Rose. A third, the Madras Division, took the field under the orders of Sir George Whitlock. The military operations of the forces under the direct command of Lord Clyde have no direct bearing on this case. The second, or Madras Division, was specially deputed to act against the rebels in the territory of Bundelcund, amongst whom were two important chiefs, the Nawab of Banda and the Nawab of Kirwee. After various operations a pitched battle was fought at Banda, in which the Nawab of that place was signally defeated, and great treasure (the Banda booty) captured. Before advancing on Kirwee, the Madras division was compelled to await certain reinforcements. Certain detachments were also left behind with the view of securing certain strategic positions and maintaining a base of communication. After the arrival of the necessary reinforce-

ments, this force next proceeded to attack Kirwee. The Nawab of that place was overthrown and his capital taken, together with a large amount of booty (the Kirwee booty), comprising coin, bullion, jewels, artillery, and arms. The estimated value of the entire booty seized by the Madras force in the course of these operations was 70,00,000 rupees. Meanwhile, the third, or Bombay division, was engaged in carrying on operations in certain other territories at some distance from the scene of the exploits of the Madras division. As to these it is only necessary to say that these operations were of a most important character, that they ended in a complete suppression of the rebellion in those districts, and had a material effect upon the general objects of the war. Some booty also, of the estimated value of 4,90,000 rupees, was captured by this force. The locality of the operations of the Bombay force, was at the nearest point 50 miles distant from that of the operations of the Madras force, and ultimately terminated at Gwalior, about 200 miles distant. Other operations took place at Ahwah Kotah and Buneos by forces under the command of Sir Henry Roberts, which although they occurred at a far greater distance, yet also materially contributed to the general objects of the war, and resulted in the capture of booty of the estimated value of 1,82,000 rupees.

It was at first proposed to throw the proceeds of all the booty captured by these forces and detachments into one common fund, and to distribute it equally amongst the forces comprising the Bombay division, the Madras division, and the detachment under Sir Henry Roberts. This was objected to by the prize agents of the Madras division (General Whitlock's force), who claimed to be entitled to a grant of the whole of the Banda and Kirwee booty. This contention of General Whitlock's force was resisted by the Bombay division and also by other detachments, who claimed to participate in the distribution on the ground of association, co-operation, and constructive assistance. A claim was also made on the part of Lord Clyde and his personal staff, to participate in the distribution, on the ground that he directed the operations as Commander-in-Chief.

In the result, the matter was referred to the Judge of the High Court of Admiralty by an Order in Council, dated 16 June, 1864, made under the provisions of 3 & 4 Vict. c. 65, s. 22, which had provided that the High Court of Admiralty should have jurisdiction to decide all matters and questions concerning booty of war which might be referred to it by the Crown with the advice of the Privy Council.

The matter came before Dr. Lushington on the 8th Jan., 1866. There was a large number of claimants; the arguments alone occupied twenty-six days; the evidence adduced by the various parties fills six volumes; whilst a very long and elaborate judgment, extending over 140 pages of the report, was delivered by the learned Judge. The following summary contains an account of the judgment in so far as it lays down general principles, and in so far as it affects the question between the Madras division, the Bombay division, the claim of such detachments of the former force as were left in occupation of strategic positions prior to the capture of the booty, and the claim of Lord Clyde and his staff.

Judgment.] The learned Judge began by observing that the Court of Admiralty had no original jurisdiction in prize matters. That which it did possess was derived from a royal proclamation usually issued on the outbreak of war, awarding prize to the takers and providing for the issue of a commission to the Admiralty Court, empowering it to determine matters of prize according to the course of Admiralty and the Law of Nations. With respect to booty (*mm*) the Court had no jurisdiction till 3 & 4 Vict. c. 65, which enacted that the Court should proceed in matters of booty in the same way as in prize cases. But this enactment only referred to the procedure to be adopted, and did not assimilate the principles on which the distribution was to take place.

With respect to the principles on which his decision was to proceed, the Statute was silent. It would, therefore, be neces-

(*mm*) The term booty is generally applied to property captured on land; prize, to property captured by sea.

sary to ascertain the true principles on which claims to joint capture depended, in order to apply them to the special circumstances of the case under consideration. Joint capture had been recognized both in decisions on naval prize and in grants of military booty. One of the most important matters in the case was to determine what effect those decisions and grants ought to have on the judgment of the Court.

As to naval decisions, it was held that none of them ought absolutely to govern the judgment in the present case. There was an essential distinction between naval prize and booty, arising from the fact of one capture being on land and the other at sea. As to booty, it must be remembered that all booty primarily belonged to the Crown, but the Crown usually disposed of it amongst the troops engaged, in such proportions as its advisers might recommend. This had always been the case in fact previously, but it was now expressly laid down by the statute 2 & 3 Will. IV. c. 53. What troops were to be considered as those engaged in the captures, was a question on each occasion for the Treasury. There were no legal decisions on the subject of booty, but the grants of booty might, when examined, disclose a course of usage to which the Court ought to attend. All prize taken in war also belonged to the Crown, but for a century and a half the Crown had been in the habit of granting the prize, after condemnation, to the captors. This not only provided a stimulus to every kind of duty, by furnishing gratuities as incidental to certain services, but also had the effect of restraining pillage.

With regard to the rules governing distribution of prize, it was commonly laid down that there were two classes—actual captors and joint or constructive captors. When a ship was taken at sea the actual captor was the ship to which the prize struck its flag. But it was important to observe that, even in this case, the phrase “actual captors” might include others besides those who had actually taken part in the capture. The whole of the ship’s crew shared in the prize, notwithstanding that they might not all have been on board at the time of the capture, or that

the prize might have been taken out of sight of the ship and at a great distance from it by the ship's tender, or by a boat's crew detached from the ship. The rule which attributed the capture to the ship and included the whole crew in the distribution of prize money, rested on grounds of practical convenience.

As to claims made on the ground of joint capture, the right to participate on this ground was admitted by the Court in two cases, viz., association and co-operation. Vessels claiming to be joint captors on the ground of association, claimed in virtue of some bond of union existing between themselves and the actual captors. Those claiming on the ground of co-operation, claimed in virtue of support rendered on the particular occasion to the actual captors. At times, however, the two grounds of claim to joint capture might co-exist.

As to association, if vessels had been associated together, a capture made by one enured to the benefit of all, and it was not necessary that the capture should have been made in the sight of the others, or that the others should have actually co-operated, beyond such co-operation as was implied in the fact that each, at time of capture, was engaged in discharging the part assigned to it in their common service. Association was recognized in the case of vessels told off by superior authority for the purpose of cruising together, or maintaining a blockade; or in the case of vessels temporarily associated, under the orders of the senior of their respective commanding officers, for the purpose of chasing and capturing prizes. In all these cases the joint captor was at the time united with the actual captor under the immediate command of the same naval officer. Community of enterprise did not of itself constitute association; and it was equally insufficient if the bond of union, though originally well constituted, had ceased to be in force at the time of the capture. Even vessels, which, in being detached to cruise between certain points, received orders "to join the fleet occasionally for communication," would, in Lord Stowell's opinion, be deemed temporarily dissevered from the fleet.

As to co-operation, a vessel in order to substantiate a claim as joint captor on this ground, must prove that in the course of the chase she was in sight of both the prize and the captor, under circumstances to cause intimidation to the prize and encouragement to the captor. In the case of the vessel in sight being a Government vessel, there was a presumption that the effect would be to cause such intimidation and encouragement, but this presumption might be rebutted by showing that she had no *animus capiendi*, as would be the case if she were steering in another direction, or lying disabled, or fixed by her duty to a blockading station. Mere diversion of the prize, moreover, did not constitute co-operation.

The result of the prize decisions, therefore, appeared to be as follows:—They declared actual capture to be the rule, joint capture the exception, admissible only in certain cases; they laid down the principle which seemed to underlie all cases of joint capture, viz., encouragement to the friend, intimidation to the foe; they exhibited two modes in which that principle might take effect, association and co-operation; and finally they enforced the necessity of assigning some limits as to what constituted co-operation.

Passing then to the subject of booty, the learned Judge, after adverting to the different character and objects of warfare as waged on sea and land, observed that these distinctions all tended to show that in considering the question and basis of joint capture in regard to booty, a wider application must be allowed to the term co-operation than in prize cases; because concerted action on a vaster scale than was feasible at sea, was indispensable to land warfare, and because military operations exercised an influence over a far wider range both of space and time. In consequence of this, the rule of right which prevailed at sea, was altogether inapplicable on land. The learned Judge then proceeded to consider the principal cases relating to booty (*n*), with the view of discovering what had been the

(*n*) Cases arising out of the campaign in Egypt, 1801; the Mahratta War, 1803; the Battle of Waterloo, 1815;

the Deccan War, 1817—1818; the War in Burmah, 1824, 1825, and 1826; the War in Bhurtpore, 1825 and 1826; the

accustomed mode of its appropriation. As the result of this enquiry he stated that the general rule for the distribution of booty was the rule of actual capture. This was quite in accordance with naval prize decisions, and also with the practical convenience of the military service. But here again difficulties arose as to fixing the meaning of the term actual captors. To confine the enjoyment of booty to those who had actually laid hands upon the property would be simply to give legal sanction to lawless plundering ; on the other hand, to distribute it indiscriminately would be to discourage personal efforts, and in many cases to dissipate the booty till it became insignificant. The line had to be drawn somewhere, and yet it must not be drawn too arbitrarily.

The course which was most analogous to the rule of the naval service, most in conformity with military usage, and most likely to work satisfactorily in the case of an army consisting of several divisions, was to draw the line between division and division. The divisional-general and the commander of a ship were alike selected for their ability to manage a force without the daily supervision of a superior, the one receiving his orders from the Commander-in-chief, and the other from the admiral of the fleet or station. Military practice, moreover, in regard to the distribution of booty, had never, except under special circumstances, drawn any distinction between detachments of the same division, where both were in the field. Practical considerations tended in the same direction. A sense of hardship and disunion would arise, if, in distributing booty, any distinction were made between members of the same division. His opinion, therefore, was that when booty had been captured by any portion of a division, that division was in the first instance to be regarded as the actual captor, and that all detachments of that division in the field were entitled to participate.

If a claim should be made by any other division, then it would have, as in the case of naval prize, to make good its claim

Expedition against Khelat, 1839 ; the Scinde War, 1843 ; the booty taken at Moultan, 1848—9 ; at Delhi, 1857 ; at

Lucknow, 1857—8 ; and at Dhar, 1857. For the facts of these cases the reader is referred to the report.

as joint captor, either on the ground of association or co-operation. Those who claimed to share in booty on the ground that they were associated with the actual captors, must prove a strict association of a military kind and not merely political. Two bodies of troops would not be associated, so as to found a title as joint captors, because they were carrying out parts of one political plan involving military operations. Even as to military association, moreover, there must be some limits. It was not enough that they should be under the same ultimate military control. To found a title on association they must be under the immediate command of the same commander. If common enterprise alone sufficed to constitute association it would be quite impossible to place limits upon it. There were two cases to which the above definition of association would not apply; one where there was a joint expedition of land and naval forces; the other where the British army was in the field with an army of an allied country. Both of those cases depended on special considerations, not needing to be treated of in this case.

As to co-operation as a ground for participation in booty, the rule of sight that prevailed at sea was clearly inapplicable; nor had this any counterpart in communication, inasmuch as communication on land could take place almost at any distance. Still, some practical limit must be imposed on co-operation as the foundation of title to joint capture. As to this, the only principle that could be laid down was that the co-operation must be one that directly tended to produce the capture in question. What tended to produce the capture, it was impossible to define once for all. Speaking generally, it could only be said that strict limits of time, place, and relation must be observed. Services rendered at a great distance from the place of capture, acts done long before the capture was contemplated, even though they affected the whole scene of operations, could not be deemed such a co-operation as would give a title to share in booty. Indirect services would also be insufficient.

The learned Judge then gave a general outline of the cam-

paign, and of the various military operations that had taken place, so far as these exhibited the circumstances under which the booty was captured, and the relation of the various forces on whose behalf claims were put forward in regard thereto. Proceeding to apply the principles previously laid down by him as to claims by reason of joint capture he came to the conclusion that the Madras force, under General Whitlock, was beyond question primarily entitled to the Banda and Kirwee booty on the ground of actual capture; further, that there was no such military association between this force and the Bombay division under Sir Hugh Rose, as would found any title on the part of the latter to share in the booty; that there was also no such co-operation as could be said to have directly tended to produce the capture in question; what co-operation there was, was altogether too remote. On similar grounds other claims, including that of Sir Henry Roberts' force, were also rejected. The claim of Colonel Keating's regiment, however, which although not actually present at the capture of either Banda or Kirwee, had nevertheless formed a part of General Whitlock's division in the field, and had acted under his orders in the operations leading to the capture, was admitted.

With reference to the claim on behalf of the late Lord Clyde, it appeared that the right of a Commander-in-chief to share in booty taken by his army was analogous to the right of the flag officer to share in naval prize taken by a ship on his station. It might be said generally that an admiral on his station, provided that he was *de facto* in command there, was entitled to a share in every prize taken by a vessel under his command. To this right there were two apparent exceptions, viz., (1) no flag officer commanding in a port in the United Kingdom shared in prizes made by any ship sailing from such port by order of the Admiralty; and (2) an admiral did not share in prize taken within the limits of his station by a vessel that would ordinarily be under his command, if the capturing vessel had been specially delegated for an independent service, and had for that purpose been detached from the admiral's authority

by paramount orders from the Admiralty. With regard to the right of the Commander-in-chief to share in booty taken by his troops, no case had been produced where he had shared if he had not been personally in the field. It was not necessary that he should be actually present with the division which made the capture; it was enough that he should be in the field with any part of the army; being in the field with one division, he was in the field with all. But if troops had been placed under the independent command of another, the Commander-in-chief, even if in the field with his army, would not share in booty taken by those troops, although under ordinary circumstances they would be under his command, either as having been detached from his army, or as operating within the territorial limits of his authority. Applying these principles to the present case, the learned judge came to the conclusion that Lord Clyde occupied the position of Commander-in-chief over General Whitlock and his troops, and that the latter did not hold an independent command. That Lord Clyde was also in the field was a matter of fact beyond dispute, and his absence from the scene of capture was immaterial. Lord Clyde, therefore, with regard to the booty, fulfilled in all respects the condition of being Commander-in-chief in the field, and in accordance with usage he was entitled to a share in it. With reference to Lord Clyde's staff, in the Indian army the right of the staff to share in booty, had always followed that of the Commander-in-chief.

The result of the judgment was that Lord Clyde and his staff, personal as well as general, were held entitled to share in the booty. Subject thereto the whole of the booty was awarded to General Whitlock and his forces, including amongst the latter the troops under Colonel Keating, and such other troops as had been left by General Whitlock along his line of march, subject only, in the latter case, to such troops having formed a portion of his division and having been still under his command at the time of the capture. All other claims were disallowed.

The Banda and Kirwee Booty, L. R. 1 A. & E.
109; 35 L. J. N. S. Adm. 17.

Booty may be defined as property seized by a belligerent on land, irrespective of its use, because it is the property of his enemy. The term is commonly applied to arms and ammunition, but it is strictly applicable to all property that can be appropriated. The term prize is generally confined to captures made at sea.

In England causes respecting booty were in early times probably determined in the Court of Chivalry held before the Constable and Marshal (o). In the time of Henry VIII. the office of Constable ceased, and thereafter the jurisdiction of the Court was frequently questioned on the ground that it could not be held before the Earl Marshal alone, with the result that the Court itself ultimately fell into desuetude.

According to the general rule of civilized countries, both booty and prize primarily vest in the State—"bello paria cedunt reipublicae." This doctrine is clearly recognized in English Law in the cases of the *Elsebe* (5 C. Rob. 173) and of *Alexander v. Wellington* (2 R. & My. 35). The Crown, however, in practice usually makes over both booty and prize to the captor. In the case of booty, the practice formerly was for the Crown to issue a warrant conveying the booty to trustees for the purpose of collection and receipt, and directing them to prepare a scheme for its distribution in accordance with certain principles therein stated, and to submit such scheme to the Lords of the Treasury for the signification of the approval of the Crown. But this practice is now subject to the provisions of the Act 3 & 4 Vict., c. 65, which authorised the Court of Admiralty to decide such matters, if referred to it by the Crown, and directed the Court to proceed as in cases of prize. As pointed out by Dr. Lushington, however, the latter provision is not to be understood to mean that in all respects the distribution of booty is to be assimilated to that of prize, but merely that the ordinary course of procedure followed in cases of prize, is to be adopted. The principles governing the distribution of booty have been already sufficiently clearly indicated in the summary of Dr. Lushington's judgment.

With regard to prize, we have first to consider what will constitute an effective capture, as between the captor and the prize, or as between the first captor and any one claiming as captor by reason of subsequent acts (p). As to this, it is laid down that a capture becomes complete when the captured vessel makes its surrender or submission, and relinquishes any *spes recuperand* (pp). The best proof of this is to be found in the actual seizure or taking possession of the prize by the captor. But this is not indispensably necessary. The fact of the captured vessel striking its colours, or indicating in any

(o) See Phillimore III., 207.

(p) A joint captor, for instance, or a sole captor claiming, by reason of the

first capture not having been completed.

(pp) See Phillimore, III., 571.

other way its submission to the hostile force, will suffice to constitute a capture, even though no actual seizure by the captor's crew was made. An attack on an enemy's ship which has the effect of compelling her to put into the port of an ally, in which she is seized, will also amount to a legal capture. In the case of *La Esperanza* (1 Hagg. 85), however, Lord Stowell held that submission or obedience to the orders of a hostile force, which was not known by the prize to be hostile, did not constitute a legal capture. If a captor should not be able to retain his possession, and should afterwards abandon his prize, another who subsequently takes her will be deemed sole captor.

With regard to the principles governing joint capture in case of prize, the more important of these have already been adverted to in the extracts given from Dr. Lushington's judgment in the leading case. It rests, as there stated, on the two grounds of association and of co-operation (*nn*). It merely remains to add that the presumption of co-operation arising from the rule of sight (*o*) applies only in favour of public ships of war and not of privateers (*oo*). This distinction rests on the ground that public ships are under a constant obligation to attack the enemy wherever seen, and therefore the mere circumstance of being in sight is regarded as sufficient to raise a presumption of their being there *animo capiendi*, whereas in case of privateers the same obligation does not exist.

As between land and sea forces it is equally necessary, in order to entitle either to participate in a capture made by the other, that there should be some direct association for the purpose of effecting the capture, or some material service rendered, contributory to it. In the case of the *Dordrecht* (2 C. Rob. 55), a claim to share in the proceeds of a prize captured by British ships, was made by certain British land forces, on the ground that they had contributed to the intimidation of the enemy. Sir W. Scott, in his judgment, laid down that possession having been taken by the fleet, the onus of proving a title to share, must rest with the land forces; that to establish a claim by joint capture they must show some contribution of actual assistance; and that when there was no preconcert this must be of a very material kind, directly influencing the capture, and without which it would either not have taken place at all, or would have been extremely doubtful; in the actual circumstances of the case he thought the claim could not be sustained.

(*nn*) See pp. 201, 202, *supra*.

(*o*) See p. 200, *supra*.

(*oo*) See Phillimore, III. 681, and cases there cited.

PRIZE OF WAR.

THE "FLAD OYEN."

Temp. 1799.

[1 C. Rob. 135.]

Case.] During war between Great Britain and France at the end of the last century, the "Flad Oyen," a British ship, was taken by a French privateer, and carried into the port of Bergen. She there underwent "a sort of process" which terminated in a sentence of condemnation pronounced by the French Consul. Under this sentence she was asserted to have been ultimately transferred to the claimant, who bought her at a sale by public auction. It appeared that the purchaser stood in the capacity of general agent in that place for the French Government, and in this capacity acted also as vendor.

From the general terms of the report, which is however very meagre, it would seem that at a subsequent period, presumably on recapture, an application was made by the original British owner for restitution, on the ground that there had never been a regular sentence of condemnation by a competent prize court.

Judgment.] Sir W. Scott, in giving judgment, stated that by the general practice of the Law of Nations a sentence of condemnation was usually deemed necessary to transfer the property in prize, and that a neutral purchaser, if he bought a prize vessel during war, looked to the legal sentence of condemnation as one of the title deeds of the ship. The learned Judge doubted if there were any instance in which a person, who had purchased a prize vessel from a belligerent, had thought himself secure in making that purchase, merely because the ship had been in the enemy's possession for twenty-four hours, or had been carried *infra præsidia*; it was, on the contrary, almost the universal practice for the neutral purchaser to require the production of the instrument

of condemnation as one of the documents of title to be furnished by the vendor. Beyond this, however, it was also necessary to show that the vessel had been, in a proper judicial form, subjected to adjudication. It was the first time that an attempt was made to impose upon the Court a sentence of a tribunal not existing in the belligerent country; and in order to be sufficient it must be shown that this was conformable to the usage and practice of nations. It would not be enough to show on mere theory that a prize tribunal might sit in a neutral country, without at the same time showing that such a proceeding was sanctioned by the common practice of nations. The efficacy of such a mode of proceeding could not be admitted because one nation had thought proper to depart from what was at once the common usage of nations, and supported by general theory independently of practice. As it appeared that no sentence of this kind had ever been put forward before, and that in the present case it was put forward by one nation only, nothing more was necessary to show that it was the duty of the Court to reject such a sentence as inadmissible.

An order was, therefore, made for the restoration of the ship to the British owners, upon payment of the usual salvage.

The Flad Oyen, 1 C. Rob. 135.

Where property has been captured on the sea, two questions present themselves:—(1) when does the title of the captor become complete as between himself and the other belligerent? and (2) within what limits will the doctrine of postliminy be applicable, or under what conditions will the rights of the original owner be deemed to revert?

The question as between the captor and the other belligerent has already been discussed (*q*). Here it is only necessary to add that, although the captor's title enures as between himself and the other belligerent when he has taken complete possession of the prize (*r*),

(*q*) See appended note to the case of the *Banda and Kirwee Booty*, p. 205, *supra*.

(*r*) This rule is also adopted by the Common Law, according to which if

the captured vessel be insured, the assured may claim against the insurer as for a total loss on the vessel being taken: see the case of *Goss v. Withers*, 2 Burr. 693.

yet as between himself and the State to which he belongs, by a rule of municipal law now almost universally adopted, he is required to bring in his prize for adjudication and to submit himself to the decree of a competent Prize Court, before he will become entitled to the fruits of his capture.

The question of the completeness of the captor's title may, however, be raised as between other persons than those previously referred to. Thus the captured property may be sold to a neutral vendee, or it may be recaptured; in both these cases claims may be made upon behalf of the original owner, which can only be rebutted by showing that the latter's title was completely divested.

In relation to this, both opinion and practice have varied greatly. The logical rule of effectual possession was at a comparatively early time superseded by a rule of a more arbitrary character, to the effect that, in order to divest the original title, the property must have been taken by the captor *infra præsidia*, or within the protection of a fleet fortress or harbour belonging to the captor or his ally. There was, however, considerable uncertainty as to the property to which, and the limits within which, this rule applied. It did not, for instance, apply to the capture of ships of war, as to which the privilege of *postliminy* remained, despite their having been taken *infra præsidia*. Another rule, which was frequently adopted in the marine ordinances of various States, made twenty-four hours' quiet possession the test of title by capture. In strictness, therefore, if a captor, according to one practice, took his prize *infra præsidia*, or, according to the other practice, kept quiet possession for twenty-four hours, he acquired a good title, which he could transmit to a neutral purchaser in the case of sale, or which would devolve on a recaptor in the case of recapture.

In the Prize Courts of Great Britain, however, neither of these conditions appears to have been regarded as sufficient. As early as the reign of Charles II., the Court of Admiralty appears to have decreed the restitution of a vessel which had been recaptured from the enemy, after having been fourteen weeks in his possession, because she had not been duly condemned (s). In 1758, in the case of *Goss v. Withers* (2 Burr. 693), Lord Mansfield observed that he had inquired into the practice of the Court of Admiralty, and was informed that the property was not regarded as divested from the original owner, so as to bar his claim against a vendee or recaptor, till there had been a sentence of condemnation by a competent Prize Court. The same view was taken by Sir W. Scott in the case of the *Flad Oyen*. In that case the learned Judge laid down in the clearest terms, that to sustain the title of a purchaser there must have been

(s) See judgment of Lord Mansfield in *Goss v. Withers*.

a sentence of condemnation emanating from a properly constituted tribunal. The only mitigation of this rule appears to have been, that where a captured vessel had been purchased under an invalid title, which was not, however, notoriously bad, the Court in decreeing restitution to the original owner, would, under certain circumstances, allow the vendee compensation for such expenditure as he had incurred in excess of ordinary repairs (*ss*).

Where a prize is sold to a neutral purchaser, the general rule may now be taken to be, that a previous condemnation by a competent Prize Court is a necessary condition to the passing of the property, and to the completion of the purchaser's title as against the original owner.

In regard to recapture, the practice of different States with regard to the rights of the original owner varies. In Great Britain, under the Prize Statutes passed at the commencement of every war, it has long been the custom, in the event of British ships or goods previously taken by the enemy, being recaptured by a British public vessel, to decree restitution to the original owner, subject to the payment of salvage; no matter what time may have elapsed since the capture, and notwithstanding the fact of a sentence of condemnation having been pronounced by a Prize Court; so long only as the prize has not been fitted out by the enemy as an armed vessel, in which case, alone, the doctrine of *postliminy* will not apply. By the Naval Prize Act of 1864 (*t*) it is laid down that where any ships or goods belonging to British subjects, after being taken as prize by the enemy, are retaken from the enemy by any of H. M. ships of war, the same shall be restored on the payment of salvage to the amount therein provided. In default of agreement to the contrary, the salvage payable is one-eighth of the value of the prize, which may be increased up to one-fourth by the Court, where the recapture has been effected under circumstances of special danger or difficulty.

The rule of the United States Prize Courts appears to be not quite so liberal. Under an Act of Congress of 1800, restitution of the property of persons resident within or under the protection of the United States is decreed, only, where the same has been recaptured before being condemned by a competent tribunal. Subject to this, however, the rule of restitution applies notwithstanding that the vessel may have been fitted out or used as an armed vessel by the enemy. The amount of salvage payable is one-eighth if the recapture was effected by a public vessel, and one-sixth if by a privateer; or if the vessel recaptured was fitted out as a vessel of war, then one-half. If the vessel recaptured was herself a public vessel, then the salvage is one-sixth in the event of the recapture being by a private vessel, and one-twelfth if by another public vessel.

(*ss*) See the case of the *Kierlikkeit*, 3 C. Rob. 96.

(*t*) 27 & 28 Vict. c. 25.

According to the law of France, if a private vessel is recaptured by a public vessel, she is to be restored to the original owners, on payment of a salvage of one-thirtieth part of her value if the captor has not had possession for twenty-four hours, or of one-tenth if twenty-four hours have elapsed, these sums being payable in addition to the expenses incident to the recapture. In case of recapture by a privateer, restitution will be decreed only if the recapture was effected before the lapse of twenty-four hours, in which case a salvage of one-third of the value becomes payable; but if the recapture took place after this time, then the prize will become the sole property of the recaptor. It will be observed that France still retains the test of twenty-four hours' possession as the condition of title in the case of recapture by a privateer, and as a ground for increasing salvage in the case of recapture by a public vessel. Although the abolition of privateering as between the parties to the Declaration of Paris of 1856 has rendered this rule of less importance, it would still apply in the event of France being at war with a State that had not adhered to that Declaration.

The practice of other States varies greatly, but the rule of twenty-four hours' possession is very frequently adopted, either as a test of title or as a ground for enlarging the award of salvage.

Where the property recaptured belongs not to a subject but to an ally, the practice of the British Courts appears to be to give the ally the benefit of the English rule of restitution, unless the ally should adopt a less liberal rule in regard to English vessels, in which case the rule of reciprocity is applied (*u*).

There is no *postliminy* in favour of the original captors where an enemy's vessel is recaptured from recaptors. Thus if Great Britain and France were at war, and a French ship were made prize by a British vessel, and then recaptured by the French, and finally recaptured again by the British, there would be no *postliminy* in favour of the original British captors (*x*).

It only remains to add that captures can be made by either public vessels, or by privateers where their use has not been forbidden by treaty, but not by private vessels, except where they have been attacked in the first instance. Captures made by a private vessel would in Great Britain enure as droits of Admiralty, but in all cases where the capture was legitimate and the conduct of the vessel was fair and meritorious, the Prize Court will award them a recompense, which may, under certain circumstances, extend to the whole value of the prize (*y*).

(*u*) See the case of the *Santa Cruz*,
p. 213.

(*x*) See the case of the *Polly*, 4 C.

Rob. 217, and Phill. iii., 639.

(*y*) See the case of the *Haase* (1 C.
Rob. 286).

THE "CEYLON."*Temp.* 1811.

[1 Dods. 105.]

Case.] The "Ceylon," an English East India ship, had been captured by the French during war between Great Britain and France. She was then taken to the Island of Johanna, where she was refitted and supplied with two additional carronades and a French crew of seventy men. She was subsequently taken to the Isle of France, where she was attacked by a British frigate, and afterwards by a British squadron. The "Ceylon," however, in company with other French ships, succeeded in repelling the attack. She was then dismantled and fitted out as a prison-ship, and was used as such, at the time of the capture of the island by the British. Proceedings were instituted by the original owners of the ship for restitution on payment of salvage. It appeared that under the Prize Act at that time in force, British ships recaptured from the enemy were to be restored upon payment of salvage, unless they had been sent forth as ships or vessels of war by the enemy. The original owners relied upon the contention that the "Ceylon" had neither been commissioned nor sent forth as a ship of war by the enemy, and that she had only been engaged in defensive operations.

Judgment.] Sir W. Scott, in giving judgment, held that in order to come within the exception set up by the statute it was not necessary that the ship should have been actually sent out of port, nor that she should have been regularly commissioned: it was enough to show that she was employed in the public military service of the enemy by those who had competent authority so to employ her.

In view of this, restitution was refused and a sentence of condemnation was pronounced.

The Ceylon, 1 Dods. 105.

This decision was given under a statute now repealed, but a similar exception to the rule of restitution on recapture is contained in the Naval Prize Act, 1864, s. 40 (*yy*), which provides that where a ship belonging to subjects has been taken by the Queen's enemies, and thereafter "set forth or used by them" as a ship of war, the ordinary rule of restitution shall not apply.

THE "SANTA CRUZ."

Temp. 1798.

[TUDOR'S LEADING CASES, 1047 ; 1 C. ROB. 50.]

Case.] In August, 1796, during war between Great Britain and France, a vessel belonging to a subject of Portugal, the ally of Great Britain, was captured by the French and subsequently recaptured by the British, after having been one month in the enemy's possession. A claim was made on behalf of the original owner for restitution ; it was resisted on the ground that the British Courts acted, in such cases, on the principle of reciprocity, and that in two analogous cases the Portuguese Courts had condemned British vessels.

Judgment.] Sir William Scott, in giving judgment, stated that the law of England on the subject gave the benefit of the rule of restitution to its allies, till it appeared that they acted towards British property on a less liberal principle. The question to be determined therefore was simply whether Portugal had applied a different rule under similar circumstances to British property. After reviewing the evidence, his lordship was of opinion that the law of Portugal established twenty-four hours' possession by the enemy to be a legal divestment of the property of the original owner, and that it would have applied the same rule to the property of allies, and that this had been actually carried into practice. The ship was therefore condemned.

[In December, 1796, an ordinance was issued by Portugal declaring all recaptures after possession by the enemy for twenty-four hours to be lawful prize. Under these circum-

stances, a second ship, captured while that ordinance was in force, was also condemned.

In May, 1797, a further ordinance was issued by Portugal directing restitution in such cases. On this ground, in the case of six other vessels, captured by the French and recaptured by the British after that date, restitution was decreed.]

The Santa Cruz, Tud. Leading Cases, 1047; 1 C. Rob. 50.

The case of the *Santa Cruz* sets forth the rules adopted by the British Courts in the case of the recapture by a British vessel of ships or property belonging to an ally or co-belligerent.

The practice of the United States appears to be identical in this respect with that of Great Britain.

THE "TWO FRIENDS."

Temp. 1799.

[1 C. Rob. 271.]

Case.] During the war which prevailed between Great Britain and France at the end of the last century, the "Two Friends," an American ship, was captured by the French, whilst on a voyage from Philadelphia to London, and subsequently rescued by her crew, part of whom were British subjects. She was brought into a British port, and some of the cargo was landed on English soil, pending the settlement of the question of salvage. A salvage suit was instituted, and a protest was made against the exercise of jurisdiction over an American ship by a British Court. It was objected by the defendants, that, inasmuch as both ship and crew belonged to the United States, the claim could only be enforced in the United States, and also that the salvors' lien, if any, did not extend to the goods which had been landed.

Judgment.] Sir William Scott, in giving judgment, laid down that every person assisting in rescue had a lien on the

thing saved. The applicants were not to be considered as American sailors, or even as American citizens, even though hired as mariners on board the vessel, inasmuch as the rescue was no part of their general duty as seamen ; it was an act perfectly voluntary, in which each individual acted as a volunteer and not as a member of the crew of the ship. Even if they had all been American seamen, it did not appear that any inconvenience would have arisen from a British Court exercising jurisdiction, for salvage was a question of the *jus gentium*, and materially different from the question of a mariner's contract ; it was a general claim upon the broad ground of *quantum meruit*. As to a contention that different countries might have different proportions of salvage, the learned Judge did not know of any rule in such cases as the present, beyond that which subjected such matters to a sound discretion and distributed the reward according to the value of the services. He desired it to be understood that he delivered no decided opinion as to whether American seamen rescuing an American ship and cargo, and bringing her into this country, might or might not maintain an *action in rem* in the Court. But if there was British property on board, and American seamen were to proceed here against that, he would think it a criminal dereliction of duty if he did not support their claim. In the present case, no American seamen had appeared, nor was it proved that there was any British property on board ; but he had no doubt that the British seamen were entitled to have their services rewarded here, and it would be a reproach to the Courts of this country, if they were not open to lend their assistance in such a case. He was, therefore, of opinion that the jurisdiction of the Court was well founded, and that the circumstance of the ship and cargo being American property would not exclude the jurisdiction, where there were any British subjects concerned, and where the goods were within the jurisdiction. As to the question whether the jurisdiction was not ousted by the landing of the goods, so far as related to such goods, the learned Judge remarked that whatever might be the law as to wreck

and derelict, it did not apply to those goods which were prize goods, there being no axiom more clear than that such goods when they came on shore might be followed by the process of the Admiralty Court. On the whole case, the Judge was, therefore, of opinion that the English seamen were entitled to redress in Great Britain, and that the goods being matter of prize, even that part which had been landed was subject to the jurisdiction of the Court; and the protest was therefore overruled and salvage awarded.

The Two Friends, 1 C. Rob. 271.

Salvage may be defined as compensation made to those through whose efforts either a ship, or her cargo, or the lives of persons belonging to her, have been saved from loss or destruction by fire or by sea, or from capture by pirates or lawful enemies.

In connection with the present subject we are concerned only with prize salvage. This may be claimed in all cases where, on the recapture of the property of a subject, or of an ally, or under certain circumstances of a neutral, such property becomes restorable to the original owner, the restitution in such cases being granted subject to the payment of salvage. To entitle a recaptor to salvage there must have been an actual or constructive original capture, and the property must have been actually rescued from the enemy, or from his control. It is not necessary that the recaptors should have taken a bodily possession, it is sufficient if they have actually put an end to, and rescued the prize from, what was at the time a complete hostile control.

As has been previously stated, the rule of the British Prize Courts is to restore to the original owner, subject to the payment of salvage, notwithstanding that there may have been a valid condemnation; save only in the case where the vessel recaptured has been fitted out by the enemy as an armed vessel. The rule of the United States Courts is to restore, subject to payment of salvage, only if there has been no condemnation, no distinction being drawn in cases where the prize has been used as an armed vessel, except for the purpose of increasing the salvage. The rule of the French Prize Courts is also to restore, subject to the payment of salvage, save in the case where the recapture has been made by a privateer after the prize has been twenty-four hours in the possession of the captor. The different rates of salvage payable have also already been

stated (x). In all cases of salvage where the rate is not fixed by positive law, it is in the discretion of the Court. The rules as to restitution and salvage in the case of recapture of the property of an ally or a neutral may be gathered from the cases of the *Santa Cruz* (zz) and the *Carlotta* (a).

Where a prize has been abandoned by belligerent captors and has been brought into a neutral port by neutral salvors, it seems that the neutral Court can decree salvage, but cannot restore the property to the original owners, as the Court has no jurisdiction to impugn the title of the captors, except where neutral rights have been infringed, and hence the proceeds, after deducting salvage, will belong to the original captors (aa).

According to British law (13 & 14 Vict. c. 26) property recovered from pirates is *prima facie* subject to condemnation as droits of Admiralty, subject to the condition that if any part can be proved to have belonged to British or foreign subjects, then the Court is to decree restitution on payment of a salvage of one-eighth of the value.

THE "CARLOTTA."

Temp. 1803.

[5 C. ROB. 54.]

Case.] In 1803, during war between France and Great Britain, the "Carlotta," a Spanish ship, whilst on a voyage from Montevideo to London, with a cargo which included some property belonging to British merchants, was captured by a French privateer, but was subsequently recaptured by the British and brought into Jersey. A claim was made for salvage on the recapture. On behalf of the Spanish claimants it was contended that no salvage could be awarded on the recapture of neutral property; that this principle had been deliberately affirmed in the case of the *Jonge Lambert* (b); and that the special considerations in virtue of which some modification of this rule had been admitted during the last war (c), did not apply to the present case.

(z) See p. 210, *supra*; and for the rates payable according to the law of other countries, see Phillimore III., 626.

(zz) See p. 213, *supra*.

(a) See p. 218, *infra*.

(aa) See the case of the *Mary Ford*, 3 Dallas, 188.

(b) See pp. 54 and 55 of the Report *in notis*.

(c) These special considerations seem

Judgment.] Sir William Scott, in giving judgment, stated that the tendency was rather against subjecting neutral property to salvage in such cases, but if any edict could be appealed to, or any fact established, showing that the property would have been exposed to condemnation in the French courts, he should hold it to be sufficient ground to induce him to pronounce for salvage in the particular case. No ground appeared from which it could be supposed that the neutral property, in the present case, would have been condemned, and the claim for salvage, so far as this related to Spanish property, was therefore rejected.

The Carlotta, 5 C. Rob. 54.

The property of a neutral is not strictly exposed to capture, except for carriage of contraband, breach of blockade, or acts of unneutral service. If, therefore, one belligerent captures neutral property, and this is recaptured by the other belligerent, the latter usually restores it without payment of salvage, on the presumption that the Court of the first captor would not have condemned it. Upon this ground, in the case of the *Huntress* (6 C. Rob. 104), an American ship carrying provisions and naval stores for the use of the American fleet, was restored without any salvage, on recapture from the Spaniards. But if any facts are shown rendering it probable that the enemy would have condemned the property, as that the goods were contraband or destined to a blockaded port, then it is usually restored only on payment of salvage. It would seem, however, from the judgment in the *Carlotta* that to warrant an award of salvage on the recapture of a neutral property, it would not be necessary to show that the captor might have condemned it justly, and in accordance with the admitted rules of International Law, but only that there would have been good reason to suppose from his practice and from the actual rules of his Prize Courts, that he would have condemned it.

The modern doctrine of the French Courts, on the subject of the recapture of neutral property, is illustrated by the case of the *Statira*, which was decided in 1800. M. Portalis (cc), in giving judgment in this case, stated that the recapture of foreign neutral vessels by public ships gave no title to the recaptors; that if a neutral vessel was unjustly seized by the cruisers of the enemy, and recaptured by a French cruiser, she ought to be restored on proof of

to have been the wholesale condemnation, by the French Prize Courts, of neutral property wherever tainted by

any contact with the enemy.

(cc) See Wheaton, by Lawrence, p. 650.

her neutrality ; and that in such cases a foreign vessel would be treated with more favour than a French vessel, on the ground that if a French vessel had fallen into the enemy's hands it would have been lost for ever, unless retaken, whereas in case of a neutral vessel, the seizure did not render it *ipso facto* the property of the enemy, the vessel losing neither its national character nor its rights until confiscation actually occurred.

PRIZE COURTS.

THE "OSTSEE."

Temp. 1855.

[9 MOORE, PRIVY COUNCIL CASES, 150 ; TUDOR'S LEADING CASES, 1036.]

Case.] In this case, a neutral vessel had been captured by a British war ship and was sent in for adjudication on the charge of having violated the blockade of Cronstadt. It appeared from the evidence, however, that Cronstadt was not under blockade either at the time when the vessel entered that port, or at the time when she took her cargo on board ; nor, indeed, was the blockade instituted till more than three weeks after she was captured. Under these circumstances, it was held by the Judicial Committee of the Privy Council, that the ship was entitled not merely to restitution, but also to costs and damages for the loss she had sustained.

Judgment.] It was laid down in judgment that the law to be applied in such cases was not to be confined to the British navy, but extended to captors of all nations. No country could be permitted to establish an exceptional rule in its own favour, or in favour of particular classes of its own subjects. By the Law of Nations, foreign decisions were entitled to the same weight as those of the country in which the prize tribunals sat. America had adopted almost all her principles of prize law from the decisions of the British Prize Courts, and in the latter no authorities were cited with greater respect than those of

the distinguished jurists of America and France. Whatever was held in Great Britain to justify or excuse an officer of the British navy, would be held by the tribunals of every country, to justify or excuse captors of their own nation. By the usage of all countries captors had a great interest in increasing the number of prizes. The temptation to send in ships for adjudication was already sufficiently strong. Where, therefore, a captor had, as in the present case, brought in a vessel without any ground for suspicion, and had no excuse to offer save that he had done wrong under a mistake, then he must make good, in temperate damages, the injury which he had occasioned. It was not open to him to suggest that, although there was no good ground for suspicion at the time of seizure, yet upon further inquiry something might have been discovered.

The Ostsee, 9 Moore, P. C. C. 141 ; *Tudor's Cases in Mercantile Law*, 1036.

Prize Courts are courts erected in different countries for the purpose of adjudicating on questions of prize.

This case is cited as illustrating the true nature and functions of such courts. Although the ship in question in this case was a neutral, yet the principles laid down, as to the obligation of Prize Courts to administer primarily the Law of Nations rather than mere municipal law, and to offer a fair hearing and mete out even justice to all, whether subjects, enemies or neutrals, apply equally to all cases. In the case of the *Maria* (1 C. Rob. 350), Sir W. Scott observed that the duty of his office required him not to deliver occasional and shifting opinions designed to serve the purposes of particular national interests, but to administer with indifference that justice which the Law of Nations held out without distinction to all independent States, whether neutral or belligerent. In the case of the *Recovery*, (6 C. Rob. 348), Sir W. Scott again remarked that the Court in which he was presiding, was a court of the Law of Nations, although sitting immediately under the authority of the Crown ; and that foreigners had a right to demand from it that it should administer the Law of Nations, and not merely principles borrowed from municipal law. As to what the duty of a Prize Court as an international tribunal would be, in the event of municipal regulations being passed inconsistent with the Law of Nations, the same learned judge in the case of the *Fox* (Edw. 312), observed that this was

a question which the Court could not well entertain *a priori*, because it could not entertain *a priori* the supposition that any such conflict would arise. In spite of this remark, however, it cannot be denied that States have at times made regulations binding upon their Prize Courts, in plain violation of International Law. Both Great Britain and France were guilty of this practice during the Napoleonic Wars (*d*). In such cases, one cannot escape the difficulty by adopting the fiction that such municipal regulations must be presumed to be declaratory of the Law of Nations. It is better to recognize frankly that the Prize Court, dependent as it primarily is on the authority of its own State, would be bound to administer such regulations as were prescribed to it. The State itself, in framing such regulations, would be doing an unwarrantable act, which would be a proper ground for protest, reprisals, or, if need be, hostile proceedings, on the part of other States affected by them.

The functions of Prize Courts are briefly:—(1.) To decree condemnation in all cases where a prize has been properly made; (2.) To order restoration of all property wrongfully captured, and in such cases to order payment of damages by the captor; (3.) To inflict punishment, in case of misbehaviour, upon members of the crew of either the capturing vessel or the prize. A decree of condemnation has the effect of vesting the property taken in the captors, subject to such distribution between them as municipal regulations require. It has a similar effect on contraband belonging to neutrals, and on property of neutrals involved in any attempt to break blockade, or in acts of unneutral service.

A Prize Court may not be erected in neutral territory, but a ship or cargo may be condemned while lying in a neutral port. In the American case of *Jecker v. Montgomery* (13 Howard, 498), it was held that a Prize Court could always proceed *in rem* whenever the proceeds of the prize could be traced into the hands of any person whatsoever. Modern practice, however, discloses a tendency on the part of maritime neutral States to impose strict limitations on the admission of prizes into their ports (*e*).

The forms of procedure vary in different countries (*f*). It has been the custom in England for more than a century to give the Court of Admiralty (now the Admiralty Division of the High Court), on the outbreak of war, authority as a Prize Court. An appeal lies to the Judicial Committee of the Privy Council. The procedure in England under the Naval Prize Act, 1864 (*g*), is shortly as follows:—The captor of a prize in the first instance delivers her into the

(*d*) As to the Berlin and Milan decrees, and the British Orders in Council, see Manning, pp. 413—432.

(*e*) See p. 277, *infra*.

(*f*) For an account of these courts and a general outline of procedure, see Phillimore, III., pp. 658 to 674.

(*g*) 27 & 28 Vict. c. 25.

custody of the marshal of the Court ; the ship's papers are then brought into the registry ; a monition issues citing all persons to show cause against condemnation ; three or four of the principal persons belonging to the captured ship are brought before the Court and examined on the standing interrogatories. After the return of the monition, the Court, on production of the examinations and the ship's papers, proceeds to make its award. The Court may direct further proof to be adduced, in cases where it appears doubtful whether the ship is good prize or not. Any person claiming an interest in the ship can enter a claim at any time before the final decree. The Court can, if it thinks fit, order an appraisement of the captured ship, and direct restoration to the claimant on his giving security to the amount of the appraisement ; it can also order the prize to be sold, where it appears advisable on account of its condition, or after condemnation. Any number of small armed ships not exceeding six, captured within three months before the proceedings, can be included in one adjudication. The Court has the power to call upon a captor to proceed to adjudication.

These provisions apply both to prize vessels and cargoes ; but, so far as relates to the custody of the ship and the examination on the standing interrogatories, they do not apply to ships of war taken as prize.

THE "MENTOR."

Temp. 1799.

[1 C. ROB. 179.]

Case.] The "Mentor," an American vessel, whilst on a voyage from Havannah to Philadelphia in 1783, was attacked off the Delaware, and after an engagement, destroyed by a British vessel. All parties were in complete ignorance that at the time a cessation of hostilities had taken place between Great Britain and the United States. After the war, a suit seems to have been instituted against the captain of the British vessel, but no report of this case appears to be extant, although the suit appears to have been unsuccessful. Some ten years afterwards a monition was filed by the same complainant, calling upon the admiral of the station to proceed to adjudication, the object of the proceedings being to fix him with liability for damages, in respect of what had occurred.

Judgment.] Sir Wm. Scott, in giving judgment, referred to the time which had elapsed since the transaction occurred, remarking, that although the Statute of Limitations did not apply to prize causes, yet there should be some rule of limitation provided by the discretion of the Court. After advertg to the fact that ten years previously a suit had been unsuccessfully instituted by the same party in regard to the same subject-matter,—and also to the fact that the object of the present proceeding was to force to adjudication a person who was neither present at nor cognisant of the transaction, on the ground that the person alleged to have done the injury had acted under his authority,—the learned Judge laid down that in such cases the actual wrongdoer was *prima facie* the proper person to fix with liability, and should be brought before the Court. He might have other persons responsible over to him, and that responsibility might be enforced, but it was the practice of the Court to have the actual wrongdoer before it.

The learned Judge further expressed the opinion that if an act of mischief had been done by the King's officers through ignorance, in a place where no act of hostility ought to have been exercised, it did not necessarily follow that such ignorance would protect the officers from civil responsibility; although if the officer had acted through unavoidable ignorance, his own Government ought to indemnify him. He was therefore inclined to think that the determination of the Judge in the former case did not turn upon the fact of ignorance only, but upon all the circumstances of the case.

Having regard to this circumstance, as well as to the fact that the admiral was absent from the scene of the transaction, and to the lapse of time that had occurred, it was held that the admiral was not liable to be called upon to proceed to adjudication, and he was accordingly discharged.

The Mentor, 1 C. Rob. 179.

This case is cited as containing the opinion of so eminent a judge as Lord Stowell, on such points as the limitation of prize suits, the

necessity in such cases of having the actual wrongdoer before the Court, and lastly, as to the effect of ignorance or mistake on liability. The case also illustrates incidentally, the principle that even where a ship has been destroyed, the belligerent may be called upon to proceed to adjudication.

TERMINATION OF WAR.

THE "SWINEHERD."

Temp. 1802.

[MERLIN, RÉPERTOIRE DE JURISPRUDENCE, TIT. PRISE, VOL. XIII., p. 183.]

Case.] The "Swineherd" was an English vessel provided with letters of marque. She sailed from Calcutta for England before the expiration of the five months fixed by the Treaty of Amiens for the termination of hostilities between Great Britain and France in the Indian Seas, but after the news of the peace had reached Calcutta, and after the publication in a Calcutta paper of a proclamation of George III. requiring his subjects to abstain from hostilities after the time fixed. A copy of the proclamation was on board. She was captured within the five months by the "Bellona," a French privateer. The "Bellona" had been informed of the cessation of hostilities by a Portuguese vessel bearing a flag of truce which had put into the Mauritius, by an Arab vessel, and also by an English vessel which she had captured; the commander was also shown a copy of the "Gazette Extraordinary of Calcutta," containing the proclamation, and he could see that the "Swineherd" was without powder. Notwithstanding this, the "Swineherd" was condemned by the French Prize Court, on the ground that a belligerent, in such a case, is not compelled to accept a notification of the cessation of hostilities from anybody but his own Government.

The Swineherd, Merlin, tit. Prise, Vol. XIII., p. 183.

War is usually terminated by a treaty of peace. Sometimes, though rarely, it is terminated by mere cessation of hostilities, or by the conquest and submission of the whole or part of one of the belligerent States. On the termination of war, the States resume their normal relation towards each other, and acts of hostility ought to cease. In default of any express provision to the contrary by treaty, the *uti possidetis* doctrine prevails, and all property at the time under the control of either belligerent vests absolutely in him.

Where there is a formal treaty of peace, hostilities should cease from its conclusion, unless a future date is fixed for the purpose by the treaty. Frequently, when hostilities affect distant regions, a future date is fixed for their termination. In such case hostilities should cease when duly authorized information of the conclusion of peace has been received; but, as is indicated by the case of the *Swineherd*, a military or naval commander is not bound to accept any communication of the termination of hostilities, unless its truth is in some way attested by his own Government.

THE GERMAN CONTRACTS FOR CUTTING WOOD IN FRENCH FORESTS.

Temp. 1871.

[HALL, p. 489.]

Case.] During the Franco-Prussian war of 1870 the German Government entered into contracts with certain persons for the cutting of wood in the French forests. Payment was made in advance, but the contracts were not completed at the time of the treaty of peace between the two Powers. Under these circumstances the contractors urged that inasmuch as the German Government had acted within its rights in the making of the contracts, the French authorities ought to allow them to complete the cutting. The French Government, however, held that the restoration of its authority had annulled the contracts, and a declaration to that effect was made in the supplementary Convention of the 11th of December, 1871. This was accepted as a correct statement of law by the German Government.

The German Contracts for cutting Wood in French Forests, 1870; Hall, p. 489.

This case illustrates the principle that, although acts done in a country by an invader cannot be nullified in so far as they have produced effects during the occupation, yet they become inoperative for the future, *jura postliminii*, so soon as the original government is restored.

The doctrine of Postliminium, which, under the influence of the text writers, has been imported from Roman Law into International Law, is a legal inference, by which persons or property captured by the enemy are presumed to be restored to their former condition, on the withdrawal of the enemy's control. This doctrine has already been treated of in so far as it affects ships or property recaptured on the sea (h).

With regard to persons, the right of postliminy takes effect on escape either to their own or neutral territory ; but it does not avail prisoners confined on a belligerent war-ship or prize in a neutral port as long as they are confined to the ship. The termination of war also effects a restoration of the individual to his former status, in the event of this having been affected by the war ; he recovers his liberty if he has been taken prisoner, and he is released from obligations which he may have entered into with the enemy respecting his freedom of conduct. An exception might not improbably be set up in the case of persons who had infringed the recognized laws of war, and whose punishment might fairly be held to remain in force notwithstanding its termination.

Movable property, taken on land, reverts to its original owner only if recaptured speedily, or, as is usually laid down, within twenty-four hours, otherwise it belongs to the recaptor. On the termination of the war such property remains in the condition in which it is found at the time, and, in default of express provision by treaty, the title of the *de facto* possessor is by implication confirmed.

With respect to immovable property belonging to private owners, this is usually exempt from seizure except where required by the invader for the purposes of the war. Where, however, immovable property belonging to private owners, or as more usually happens immovable property belonging to the Government of the invaded State, has been appropriated, by an enemy in military occupation of the country, neither the title of the invader, nor any title made through him, can be deemed complete, unless the occupation is followed by definitive appropriation, or unless the rights so acquired are expressly confirmed by treaty of peace or cession. In default of this the *jus postliminii* will always operate in favour of the former Government or its subjects, in the event of the territory being restored or recovered. In such case, the restored Government or its

(h) See the case of the *Flad Oyen*, p. 207, and appended note.

subjects are entitled to take their property free from any contracts, grants, charges, or similar incidents attached by the conqueror whilst in possession, except in so far as they have already produced effects. Hence the purchase from an invader in military occupation of a district, of any portion of the national domain of the invaded State, would be subject to the risk of the purchaser being evicted by the former Government on the withdrawal of the invader, unless express provision for the continuance of his rights were made by the treaty of peace (i). It was upon this principle that the Courts of the United States decided that grants of territory made by British governors, after the Declaration of Independence, were invalid, though grants made before that date were expressly saved by the treaty of peace (j).

CASE OF THE ELECTOR OF HESSE CASSEL.

Temp. 1832 circa.

[PHILLIMORE'S INTERNATIONAL LAW, PT. XII., C. VI.]

Case.] Before the invasion of Germany by Napoleon, the Elector of Hesse Cassel held, in the territory of which he was sovereign, certain domains as his private property. He also held mortgages on certain lands both of his own subjects and of the subjects of other German States. After the battle of Jena, in 1806, he was expelled from his dominions by Napoleon, and did not return until the French domination in Germany was put an end to by the battle of Leipzig in 1813. Hesse Cassel had meanwhile remained for about a year under the immediate government of Napoleon, and was afterwards incorporated into the newly created State of Westphalia. During Napoleon's administration of Hesse Cassel he had confiscated the private property of the Elector, and compelled the payment to himself of some of the debts due to that prince from his subjects. After the creation of the Kingdom of Westphalia, an arrange-

(i) This case must be distinguished from that in which the conqueror definitely establishes himself as the *de facto* sovereign or government of the country; see the case of the *Elector of*

Hesse Cassel.

(j) See *U. S. v. Rice*, 21 Curtis 391, and *Wade v. Barnevall*, 2 Bays. U. S. Rep. 299.

ment was come to between Napoleon and his brother Jerome, the newly appointed King, in virtue of which debts due from persons who were not subjects of the King of Westphalia, were to be paid to Napoleon, whilst debts remaining due from subjects of that State were to be paid to the King. Under this arrangement Napoleon succeeded in obtaining payment from various debtors and mortgagors to the Elector, who were subjects of other German States. Amongst those who thus made payment to Napoleon was a certain Count von Hahn, a subject of the Duke of Mecklenburg; the Count not only received a discharge from Napoleon, but the registered mortgage was officially recorded as extinguished in the proper office, under a rescript of the Mecklenburg Government. After the overthrow of Napoleon, the Elector was restored to his dominions, his restoration being confirmed by the Treaty of Paris, 1814. He thereupon resumed possession of his private domains, in many instances ousting purchasers who had acquired a formal and a legal title from the preceding *de facto* sovereign. The ousted proprietors appealed to the Congress of Vienna, but although Prussia declared in their favour, neither that Congress nor the Diet of the German Confederation appear to have afforded them any aid. With respect to debts due from the subjects of Hesse Cassel, which had been paid to the *de facto* Government, the tribunals of that State appear to have pronounced in favour of the validity of the releases granted and of the discharges thereby effected, but with what result, is not clear.

The matter of the mortgage of Count von Hahn, on which the Elector claimed to be still entitled, was referred to various German universities. In the result, it was held that a distinction must be drawn between acts done by a transient conqueror and those done after the entire subjugation of a State; in the former case, the right of the conqueror was confined to his private acts, the validity of which would depend on actual seizure and possession; in the latter, his rights must be regarded as having been ratified by public act of State; Napoleon's right having been of the latter kind, the fact of the property having

been the Elector's private property was immaterial; nor could any consideration of the justice or injustice of the war be allowed to interfere with the operation of this principle. It was further pointed out that the Elector, from the time of his abdication, had been regarded as an enemy by the new Government, and that his property therefore became liable to confiscation; the doctrine that he retained constructive possession of the debts by reason of his having the acknowledgments of the debtors in his hands was pronounced untenable; on the conclusion of the war no *restitutio in integrum* could be said to take place, and even according to the Roman Law, the restored owner must take the property as he found it, without compensation for damage suffered in the interval. Finally, it was pointed out that the return of the Elector could not be considered as a continuation of his former government, inasmuch as he had not, in the meantime, been constantly in arms against Napoleon and at last successful by force of arms in recovering his domains; he had been treated for a time by the public acts of other States as politically extinct, and the new kingdom had been duly recognized by other Powers.

In view of these considerations, an opinion was pronounced that all the debts, for which discharges had been given by Napoleon, whether the whole sums had been paid or not, must be regarded as having been validly and effectually paid.

Case of the Elector of Hesse Cassel, Phillimore's
International Law, Pt. XII., c. VI.

Where in the course of military operations any part of the territory of one belligerent is occupied by the other, then if the subjugation amounts to a mere temporary and involuntary submission to force, the state of war is deemed to continue, and the *jus postliminii* will operate on the removal of the control; but if the dominion of the conqueror has been confirmed by treaty or consent, or lapse of time, then the war must be deemed to have ceased and the *jus postliminii* to have been extinguished (*k*). It is

(*k*) See Pando, cited Phillimore, III., p. 786.

possible, however, that without actual treaty or cession a new government or authority may have been set up, and yet, after some lapse of time, a restoration of the original Sovereign or authority may take place. In this case the rules commonly laid down as to the effects of the restoration of authority, are :—(1.) All changes made by the intermediate government in the constitution become inoperative ; (2.) The ancient laws and administrative institutions become re-established ; (3.) But no private rights acquired during the foreign *régime* ought to be set aside, provided they are consistent with public order ; (4.) All dispositions of the State property made by the intermediate government are binding ; (5.) The restored Sovereign ought not to make a retrospective use of his power (*l*). In accordance with these principles, after the downfall of Napoleon, the greater Powers such as Austria and Prussia either recognized, or at all events left undisturbed, such titles as had been *bonâ fide* acquired from the intermediate *de facto* government set up by Napoleon.

With regard to debts, it may be laid down as a general rule that a *bonâ fide* payment made to the intermediate *de facto* government will extinguish the liability of the debtor (*m*). It would seem also that even where payment is made to a transient conqueror, the debt will be extinguished, subject to the debtor being able to prove that the money was actually paid over at the proper time and place, and under threat of compulsion on the part of the conqueror. But the debtor must not have been *in mora*, otherwise the fact of the money having come into the hands of the actual payee will be deemed due to his default, and repayment will have to be made (*n*).

CASE OF COUNT PLATEN HALLEMUND.

Temp. 1866 *circa*.

[FORSYTH, 335.]

Case.] At the time of the capitulation of the Hanoverian Army to Prussia in 1866, Count Platen Hallemund was Prime Minister of Hanover. After the annexation, the Count con-

(*l*) See Heffter, § 188.

(*m*) This case must be distinguished from the case where a foreign Government confiscates debts due from its own subjects to subjects of the enemy, as occurred in *Wolf v. Oxholm*, see p. 161,

supra ; such an act not being warranted by modern usage, would probably not be recognized as valid or effectual in the Courts of another country.

(*n*) See Phillimore, III. p. 829.

tinued in attendance on the ex-King, and took up his abode in Vienna. Subsequently he was summoned before the Prussian tribunals to answer a charge of high treason alleged to have been committed after he had ceased to reside in Hanover. By the law of Prussia, Prussian subjects can be prosecuted for high treason committed abroad; but, in the present case, exception was taken to the jurisdiction of the Court on the ground that the Count was not a Prussian subject. The matter was submitted to two German jurists, Professor Zachariaë of Göttingen and Professor Neumann of Vienna. These jurists gave an opinion to the effect that the mere forcible conquest of a country did not of itself create the relation of Sovereign and subjects, between the conqueror and the conquered. They laid down that to create such relation, there must be an express or tacit submission to the new government, although the mere remaining in the country after the conquest and performing the duties of a subject would amount to a tacit submission; whether or not they would make such submission and acknowledge the new Sovereign, was a question for the inhabitants themselves, and liberty ought to be accorded them of leaving the country if they chose. This opinion was not, however, acted on by the Court before which the case came, and the Count was sentenced, *in contumaciam*, to fifteen years' penal servitude.

Case of Count Platen Hallemund, Forsyth, 335.

In the case of the *Elector of Hesse Cassel* the question was, as to the proprietary rights of a conqueror who had established a new government in the place of the original authority. The case of the *Count of Platen Hallemund* raises the question as to the personal relation of such a Government to the original inhabitants. The opinion of Professors Zachariaë and Neumann contains a correct statement of existing principles as to the personal liabilities of the inhabitants of the conquered territory. If the inhabitants choose to remain despite the conquest, then they must be deemed to have tacitly acquiesced in the new relation established between them and the government of the conqueror. But if they withdraw, then to affect

to punish as treason, a mere refusal to submit to the new authority, unaccompanied by any attempt to create civil disturbance, would be a mere wanton abuse of power. Unfortunately the conduct of the conqueror in such cases is apt to be regulated by other considerations than those of legality, and even courts of law are found to defer to the feeling of resentment entertained by a powerful prince. Where the conquest of new territory is confirmed by treaty of peace or cession, it is usual to stipulate for a right of withdrawal on the part of such inhabitants as may desire it. Even where this is not done, no impediment ought to be placed in the way of such withdrawal; nor should the property, which may be left behind by those who withdraw, be confiscated or molested. Such of the inhabitants as remain, naturally contract a new tie of allegiance towards the conquering State. Although the conqueror in such cases almost necessarily acquires supreme control over the conquered territory and its inhabitants, yet as a principle of political morality, the conquering State ought to interfere as little as possible with the personal and private rights of the inhabitants. In the American case of *Johnson v. M'Intosh* (8 Wheaton, 588), Marshall, C.J., in delivering the judgment of the Court, observed that conquest gave a title which the courts of the conqueror could not deny, whatever the private and speculative opinions of individuals might be respecting the original justice of the claim which had been successfully asserted; but although title by conquest was acquired and maintained by force, yet humanity, acting upon private opinion, had established as a general rule, that the conquered should not be wantonly oppressed, and that their condition should remain as eligible as was compatible with the objects of the conquest; most usually they became incorporated with the victorious nation; where practicable, humanity demanded, and a wise policy required, that the rights of the conquered to their property should remain unimpaired, that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections and united by force to strangers.

PART III.—NEUTRALITY (o).

NEUTRAL TERRITORY.

THE "ANNA."

Temp. 1805.

[5 C. ROB. 373.]

Case.] During war between Great Britain and Spain, a Spanish ship, sailing under American colours, with a cargo of logwood and specie, was captured whilst on a voyage from the Spanish Main to New Orleans, by the "Minerva" privateer, near the mouth of the River Mississippi. On the case coming

(o) It may be of assistance to the reader in studying the cases following, to remember that the Law of Neutrality includes two main topics, one dealing with the rights and obligations of the belligerent and neutral States as between themselves; the other with the relations between a belligerent State and neutral individuals. Amongst the more important rights of a neutral State we may enumerate the right to the inviolability of its territory, and to a compliance by either belligerent with the municipal regulations made by the neutral in preservation of its neutrality (see the cases of the *Anna* and the *Twee Gebroeder*). The right in regard to one belligerent naturally involves a duty towards the other. The duties of a neutral State seem to group themselves under two heads, one dealing with what the State must abstain from doing itself (see the case of the *Swedish Frigates* and appended note thereto); the second dealing with obligations which the neutral State must enforce on its own subjects and subjects of the other belligerent within its territory. The more important obligations of this

class, are those of preventing the issue of commissions (see the case of *M. Genêt*), of preventing the preparation of hostile expeditions (see the *Tercera affair*), and of preventing the construction or outfit of ships of war (see the case of the *Alabama* and following cases), and of preventing its territory from being used as a base of operations (see the case of the *Shenandoah*). It is also bound to prohibit, within its territory, illegal enlistment, active or passive, or the participation by its subjects in other hostile acts towards either belligerent (see the case of *Gideon Henfield* and cases following). The fulfilment of these obligations is usually secured by provisions of municipal law (see *Excursus on Neutrality Laws*). Finally, the relation of the belligerent State towards neutral individuals includes an account of the liabilities of neutral trade, in the matter of the carriage of hostile goods on neutral ships, or neutral goods on hostile ships, the carriage of contraband, the breach of blockade, and the taking part in a trade closed to the neutral in time of peace (see cases under these heads).

before the English Prize Court, a claim to ship and cargo was made by the United States ambassador, on the ground that the ship was taken within the jurisdiction of the United States, at the distance of one and a half miles from the western shore of the principal entrance to the river, and within view of a fortified post where an officer of the United States was stationed. As a matter of fact it did not appear that the actual capture took place within three miles of this fort; but it did appear that it took place, within three miles of some small mud islands, composed of earth and trees drifted down by the river, which formed a kind of portico to the main land.

Judgment.] Sir W. Scott, in his judgment, laid it down as a well known rule, "*terre dominium finitur ubi finitur armorum vis*," and stated that since the introduction of fire-arms that distance had been recognized to be about three miles from the shore. He further held that the three mile limit must be reckoned from the islands, these being the natural appendages of the coast on which they bordered. On this ground restitution was decreed; the reprehensible conduct of the captors was visited with costs and damages.

The Anna, 5 C. Rob. 373.

The principle of the inviolability of neutral territory was one of the earliest restraints placed upon belligerent operations. The rule does not appear to have been at first very strictly observed. Thus, in the year 1798, the French frigate "Modeste" was captured by the English in the harbour of Genoa; no apology was offered for the violation of neutral territory, nor was the captured vessel restored (*p*). In the same year, however, the "Grange," a British ship, having been captured by the French in Delaware Bay, was restored, on the ground that the inviolability of neutral territory protected the property of belligerents when within it (*q*). Several instances of the violation of neutral territory occurred even as late as the American Civil War. In 1863 a Confederate prize was pursued by the Federals and recaptured whilst within British waters; the British Govern-

(*p*) See Hall, p. 604.

(*q*) See Kent, p. 303.

ment intervened, with the result that the vessel together with those who had been captured on board her were restored, and amends made for the violation of British territory. In 1864, the "Florida," a Confederate vessel, was seized by a Federal cruiser whilst in a Brazilian port; the Brazilian Government thereupon demanded reparation, with the result that the crew were surrendered, the vessel herself having meanwhile foundered; the Brazilian flag was also saluted by way of apology, and punishment inflicted on those responsible for the outrage.

The limit of neutral territory extends to a distance of three miles from the nearest land.

Where a capture has been effected in violation of neutral territory, the remedy is threefold. In the first place, if the matter comes before the belligerent Prize Court at the suit of the captor, the prize ought to be restored, on an application to this effect being made by the ambassador of the neutral State whose territory was violated. For the purpose of making such a claim, however, the other belligerent is not regarded as having any status. In the case of the *Anne* (3 Wheaton, 435), Story, J., laid down, that in such cases neither a neutral consul, nor the belligerent owner of the captured vessel, could be admitted to contest the validity of the capture, and that it was only the neutral Sovereign or his international representative who could put forward such a claim. In the *Vrow Anna Catharina* (5 C. Rob. 15), Sir W. Scott observed that when the fact of neutral territory was duly established it overruled every other consideration, the capture was invalidated, and the property must be restored, even though it belonged to the enemy.

In the second place, if after such an illegal capture the captured vessel should at any time be brought within the neutral jurisdiction, the neutral State may lawfully cause restitution to be made, unless, perhaps, in the case suggested by Wheaton, of the vessel having been previously carried *infra præsidia*, and condemned by a competent Court (r). Ortolan, however, suggests that even in this case restoration should be made (s). Probably the latter view is right; nothing except the furnishing of the vessel illegally captured with a commission will suffice to exclude the neutral jurisdiction. In the case of the *Estrella* (4 Wheaton, 298), it was laid down by the United States Courts, that wherever a prize was brought within the neutral jurisdiction, it was competent to the neutral Court to enquire whether its neutrality had been in any way violated. Although the breach of neutrality complained of in this particular case was an illegal augmentation of force, yet the principle would be equally applicable

(r) See Wheaton by Lawrence, p. 725.

(s) See Ortolan, Vol. II., p. 303.

to the case of an illegal capture within neutral territory. Where restitution is sought from the neutral State, it is the belligerent Government injured by the capture, and not the individual owner, who ought to put in the claim; even a consul is not generally deemed to be clothed with sufficient representative character to appear on behalf of his State for this purpose (*t*).

Lastly if restitution should not be secured in either of these ways, then the injured belligerent will be entitled to demand compensation from the neutral; whilst the neutral whose territory has been violated will in its turn have a just claim for satisfaction from the belligerent, by whose vessels or subjects the illegal capture was made; failure to render satisfaction would in either case afford a just cause of war.

THE "TWEË GEBROEDER."

Temp. 1801.

[3 C. ROB. 336.]

Case.] During war between Great Britain and Holland, several vessels were captured by the British in the Groningen Watt, on the ground that they were bound for Amsterdam, which was then under blockade. The Watt is an arm of the sea, lying between East Friesland and Groningen. A claim for restitution was made by the Prussian minister on the ground that the capture took place on what was alleged to be Prussian territory, Prussia being at the time neutral. Condemnation of the ships was decreed, it being held after a review of the facts, that the capture was not made on neutral territory.

A question was also raised as to whether the capture was not invalidated, by reason of the belligerent ship having passed over neutral territory *animo capiendi*.

Judgment.] Sir Wm. Scott, in his judgment, after giving an account of the history of the jurisdiction over the place, which

(*t*) It seems that when the capture has been the result of a remoter breach of neutrality on the part of the offending belligerent, as by making neutral

territory the base of operations, the claim for restitution may be put in by the private owner or consul.

it is unnecessary to insert here, laid down the following important principles with regard to the inviolability of neutral territory, viz., (1) that the act of a war vessel passing over neutral waters without violence would not be considered a violation of the rights of that territory ; (2) that the mere granting of a passage to troops of a belligerent through neutral territory would not afford a ground of complaint to the other belligerent ; (3) that the mere passage of a ship over waters claimed as neutral territory, would not invalidate an ulterior capture, unless the passage was an unpermitted one over territory where permission was regularly required, or one taking place under a permission obtained by false representation.

The Twee Gebroeder, 3 C. Rob. 336.

In the present day, to allow the passage of belligerent troops over neutral territory would probably be regarded as a gross violation of neutrality, and, if the other belligerent chose so to regard it, as a *casus belli*. But according to the earlier view, the passage of troops over neutral territory does not appear to have been considered in this light. Even by modern jurists it is sometimes laid down that this is permissible, if the privilege be afforded impartially to both belligerents. But the balance of modern opinion and actual practice are alike opposed to this view. In 1870, Switzerland denied the privilege of passage to bodies of Alsatians enlisted for the French army, notwithstanding that they were without arms or uniforms. In the same year Belgium refused to accede to the request of the German Government that the German wounded in France might be allowed to be transported to German territory across Belgian territory (*tt*). In other respects the principles laid down by Sir Wm. Scott may still be said to hold good ; although, as was decided in the other case of the *Twee Gebroeder* (*uu*), if the capturing vessel should be actually lying within neutral territory, the capture will be invalidated, although the prize was captured by boats outside.

(*tt*) See Hall, p. 603.

(*uu*) See next page.

THE "TWEË GEBROEDER."*Temp.* 1800.

[3 C. ROB. 162.]

Case.] During war between Great Britain and Holland four Dutch ships were captured by the British in the Western Eems near the Groningen Watt, by boats sent from H.M. ship "L'Espiègle," then lying in the Eastern Eems. Restitution was claimed by the Prussian representative, on the ground that the vessels were captured within the limits of Prussian territory. It appeared that the place where the warship herself was lying, was at the most three miles from East Friesland, and that at low tide it was immediately connected with the land. Under these circumstances, it was contended that the fact of the vessel herself being stationed within neutral territory infected all captures made by her boats outside.

Judgment.] Sir Wm. Scott, in his judgment, laid down that no proximate acts of war could be allowed to originate on neutral territory; and that such an act as a ship stationing herself on neutral territory and sending out her boats on hostile enterprises beyond, was an act of hostility much too immediate to be permitted. Restoration was accordingly decreed, but a claim for costs and damages was refused on the ground that the capture arose from misapprehension and mistake, and not from an intention to violate what was clearly neutral territory.

The Twee Gebroeder, 3 C. Rob. 162.

The principle laid down by Sir Wm. Scott in this case, viz., that no proximate acts of war can be allowed even to originate on neutral territory, is a very important one. It extends to all acts of hostility taking their origin in neutral territory, and covers the case of the use of neutral territory by one belligerent, as a base of operations against the other. Thus if one belligerent should attempt to draw his resources and reinforcements from neutral territory, or should start from neutral territory and seek to retire there in case of need, this would constitute an offence against the neutral State, and, if knowingly permitted and indulged by that State, would constitute a

violation of its neutrality in respect of the other belligerent. The Fenian raids on Canada of 1865 and 1870 afford an illustration of this kind of illegality. These raids were arranged and organized in the United States, and on being repulsed the raiders took refuge in United States territory, with a merely nominal interference on the part of the authorities (*u*). A similar illegal use of neutral territory, as a base of operations, may occur in naval warfare. Thus if a belligerent cruiser were to have recourse to a neutral port for the purpose of obtaining coal and other necessities, and if this use were constantly renewed as a preliminary to further operations, the neutral country would practically become her base of supplies, although the supplies might not in themselves be of a war-like character. The crucial test in such cases appears to be continual use (*v*). A usage is in course of growth tending to limit even the right to coal and supplies, on the part of belligerent warships. Thus during the American Civil war, under the English neutrality regulations, belligerent cruisers were only allowed to take so much coal as would take them to the nearest port of their own country, and were not allowed to take any further supply from any English port within three months. Similar regulations were made both by Great Britain and the United States during the Franco-German war of 1870.

THE "GENERAL ARMSTRONG."

Temp. 1851.

[ORTOLAN, DIPLOMATIE DE LA MER, VOL. II., p. 300.]

Case.] In 1814, during war between Great Britain and the United States, the American privateer "General Armstrong" was found by an English squadron in the harbour of Fayal, in Portugal. A detachment from the squadron on approachin the privateer was fired upon ; in consequence of this, on the following day, one of the vessels of the squadron took up her position near the privateer and succeeded in capturing it. Thereupon a claim was made by the United States against the Portuguese Government, for breach of duty in allowing a United States vessel to be captured within Portuguese territory

(*u*) An account of these expeditions will be found in Wheaton by Lawrence, p. 585.

(*v*) On this subject see the case of the *Shenandoah*, p. 273, *infra*.

Portugal resisted this claim on the ground that the captain of the "General Armstrong" had himself engaged in belligerent operations. No agreement was at first arrived at ; but in 1851 the matter was by consent submitted to the arbitration of Louis Napoleon, then President of the French Republic.

Award.] The arbitrator held that as the captain of the privateer had not applied at the outset to the neutral state, but had used force to repel the aggression, he had himself disregarded the neutrality of the territory, and had released its Sovereign from all obligations to protect him otherwise than by good offices, and that the Portuguese Government could not from the time of his having done so be held responsible for the results of the collision that had taken place in contempt of its sovereign rights.

The General Armstrong, Ortolan, *Diplomatie de la Mer*, Vol. II., p. 300.

The decision in the above case was based on the principle that a belligerent who, when attacked on neutral territory, elects to defend himself, releases the neutral from all responsibility in respect of the violation of territory. The same principle was recognized in the case of the *Anne* (8 Wheaton, p. 435), where it was held that a prize captured within neutral territory, had forfeited its right to neutral protection, by reason of its having been the first to commence hostilities.

THE "CAROLINE."

Temp. 1843.

[PARLIAMENTARY PAPERS, 1843, VOL. LXI.]

Case.] During the rebel raids on Canada a small passenger ship, the "Caroline," was made use of by the insurgents for the purpose of carrying arms and forces from the territory of the United States into Canada. The officer in command of the British forces determined on attacking the "Caroline" at a time when he expected she would be moored in British territory,

near Navy Island, in the Niagara River. When the attack was about to be made, it was found that she had altered her usual moorings, and had shifted to the United States side of the river. Notwithstanding this the attack was made, the vessel was boarded, and after a short resistance sent down the Niagara.

The affair was taken up by the United States Government, and war seemed imminent. In the negotiations which ensued, Great Britain complained that a hostile expedition had been permitted by the United States Government without any effort being made to suppress it; that American citizens had supported seditious movements against Canada; and that one McLeod (2) had been arrested when within United States territory and prosecuted for his part in the affair of the "Caroline." The United States Government, on the other hand, complained that the attack was not such as was warranted by the necessity of self-defence; that it was made upon a passenger-ship at night; that it was an invasion of United States territory; and that, though the case had been brought to the notice of the British Secretary for Foreign Affairs, unnecessary delay had taken place in the communication of his decision in the matter. The negotiations lasted over five years, but the matter was in the end settled amicably. The British Government expressed their regret for what had occurred, and that an apology had not been made at the time, and the United States accepted these explanations.

The Caroline, Parliamentary Papers, 1843, Vol. LXI.

This case is cited under neutrality, as illustrating the rule, that, though neutral territory is generally to be regarded as inviolable, yet overwhelming necessity may justify a departure from this principle. In the negotiations which ensued, the United States admitted this exception, though they called on Great Britain to show that such overwhelming necessity existed (a).

(2) McLeod's case is referred to on p. 122, *supra*.

(a) For an account of the Fenian

raids on Canada, and the action of the United States authorities, see Wheaton by Boyd, p. 517.

NEUTRAL DUTIES (A) (b).**DISPUTE BETWEEN DENMARK AND SWEDEN.***Temp.* 1788.

[ANNUAL REGISTER, 1788, 292 & 293; PHILLIMORE'S INTERNATIONAL LAW, Vol. III. pp. 229—231.]

Case.] In 1788, during war between Sweden and Russia, Denmark, in accordance with the provisions of a previous treaty to that effect, furnished Russia with ships and troops. Notwithstanding this, the Danish Government, in a declaration delivered to the Swedish Ambassador at the Court of Copenhagen, stated that it still considered itself to be at peace with Sweden; that the peace would not be interrupted by the defeat of the Danish auxiliaries; and that Sweden had no ground of complaint so long as the auxiliaries did not exceed the number stipulated for. A counter-declaration was thereupon made by Sweden to the effect that the doctrines set up by Denmark could not be reconciled with the Law of Nations, or with the ordinary rights of Sovereigns, and that the Swedish Government, therefore, entered its protest against such action on the part of Denmark; but it was added, that, for the purpose of preventing war and bloodshed between the subjects of the two Kingdoms, the Swedish Government would, under the circumstances, and in view of the efforts then being made to restore peace, rest satisfied with the declaration of the Danish Government that it had no hostile views against Sweden.

Dispute between Denmark and Sweden, Annual Register, 1788, 292 and 293; Phillimore's International Law, Vol. III., pp. 229—231.

(b) It has been thought desirable to treat of neutral duties under three heads: (A) Duties of neutral state in regard to its own conduct; (B) Duties in regard to the conduct of its own subjects; and (C) Duties in regard to

the conduct of subjects of either belligerent within its own territory. It is impossible, however, always to keep the two latter topics apart. In the *Alabama* and following cases, they are unavoidably mixed up.

Much of the existing law of neutrality is of modern growth. The dispute referred to illustrates the fact that at the close of the eighteenth century, at least, it was not a definitely settled principle of International Law, that a neutral State must not supply troops to either belligerent. Although the rendering of such military assistance is still treated either as an open question or even an admitted right by certain jurists, there can be little doubt that by modern usage, it would be considered a flagrant violation of neutrality, for a neutral State to supply troops to a belligerent even under treaty. The other belligerent might justly regard this as a *casus belli*. During the present century no instance is to be found of a nation rendering military assistance to one belligerent whilst professing to maintain its neutrality in regard to the other; nor would any Government now venture to conclude a treaty with that intent (c). On principle, too, it would seem that if a neutral State is bound to prevent the levy of men within its territory for the service of either belligerent, much more is it bound to abstain from itself rendering actual military assistance to either party (d).

THE CASE OF THE SWEDISH FRIGATES.

Temp. 1825.

[DE MARTENS CAUSES CÉLÈBRES, VOL. V., p. 229.]

Case.] In 1825, during the war between Spain and her colonies, the Swedish Government offered for sale three of its war vessels. They were ultimately purchased by two merchants, who resold them to London houses. It was then discovered that the vessels had been bought on behalf of the Mexican insurgents. The Spanish Secretary of Legation thereupon demanded the rescission of the contract. The Swedish Minister replied that precautions had been taken to prevent injury to Spanish interests, and that a power of rescission

(c) See Hall, p. 596.

(d) Although municipal rules on this subject may not afford any true measure of the limits or extent of the international obligation, yet the passing of such regulations clearly points to

the recognition of a general obligation on the part of neutral States to prohibit their subjects from taking part in the war, or from contributing assistance to either party.

had been inserted in the contract for sale. Later on, the matter was also taken up by Russia, and, after considerable negotiation, instructions were given to the officers appointed to take the ships to England to wait for further orders. On account of the delay, the English purchasers demanded a rescission of the contract, and this demand was complied with by the Swedish Government.

Swedish Frigates sold to Mexico, De Martens Causes Célèbres, Vol. V., p. 229.

The obligations of a neutral State preclude it from supplying or even selling articles or munitions of war to either belligerent. The transaction forbidden, however, is only one occurring between State and State. There is nothing to preclude the neutral State from selling such articles to individuals as a purely mercantile transaction, unless there were reason to believe that the purchase was being effected by a belligerent under cover of the name of some private firm. Such at least was the attitude taken up by the United States during the Franco-German war (e). If the Swedish frigates, in the case cited, had really been sold to private individuals who had taken their chance of a market, and if the latter had, in the ordinary course of trade, resold them to agents of the Mexican Government, Spain would, under the then rules of International Law, have had no reason to regard this as an infringement of Swedish neutrality. Since that time, however, new usages have sprung up, or at any rate are in course of growth, with regard to the construction and sale of vessels fit for war. In the present day, a neutral State, in similar circumstances, might, not improbably, render itself liable, not perhaps in respect of the sale of the ships to individuals, but for allowing them to be despatched from neutral territory, with reasonable cause to suspect their ultimate destination and use (f). Subject to this, however, neutral individuals are still at liberty to sell or supply munitions of war to either belligerent, although they run the risk of the capture and condemnation of such articles, as contraband, whilst in course of transmission to the belligerent. But this would not warrant the supply of such articles to belligerent vessels in neutral ports.

A neutral State is also precluded by the Law of Nations from lending money to either belligerent, or from guaranteeing or

(e) See p. 264, *infra*.

(f) This would certainly be the case as between Great Britain and the United

States of America; but as between other nations, see p. 258, *infra*.

promoting any such loan. Such a transaction, in spite of the opinion of Vattel, would now constitute as distinct a violation of neutrality, as the sale of articles of war or the supply of troops. This seems to have been recognised by the United States as early as the close of the last century. During the war which then prevailed between Great Britain and France, two envoys were sent by the United States Government to the French Republic, in order to settle certain differences which had arisen between the two countries. In a despatch, dated March 23rd, 1798, the United States Government instructed its representatives that no treaty should be purchased with money, by loan, or otherwise, inasmuch as such a loan would violate the neutrality of the United States (*g*). There is nothing, apparently, which requires a neutral State to prohibit such loans being made by its subjects if they are made *bonâ fide*, and as purely commercial transactions (*h*).

So far we have dealt only with those aspects of the neutral obligation, which imply an abstinence from acts involving a participation in the war. Strict neutrality has, however, another aspect, viz., that of impartiality. This involves the duty of affording no countenance or privilege, even of a permissive character, to one belligerent, which is denied to the other. It has been contended that it would be no violation of neutrality for a neutral State to allow the prizes captured by one belligerent to be brought into its ports, in compliance with the provisions of a prior treaty, and yet to deny this privilege to the other (*i*). But although this privilege might reasonably be denied to both belligerents, yet if it were granted to one and refused to the other, it would, apparently, constitute a breach of neutral duty, and give the aggrieved belligerent just cause of offence.

(*g*) American State Papers, Vol. II. p. 201.

(*h*) The precise limits of neutral duty in regard to loans or contributions by the subjects of a neutral State to a

belligerent, and the attitude taken up by English Law towards such transactions, are not so clear. See *Excursus* II., p. 246, *infra*.

(*i*) See Wheaton, by Boyd, 571.

EXCURSUS II. LOANS BY NEUTRAL SUBJECTS TO BELLIGERENT STATES.

The increasing costliness of modern warfare not infrequently imposes on belligerent States the necessity of contracting loans in other countries.

In respect to such loans three questions suggest themselves : (1) Is the neutral State under any obligation at International Law to prohibit a subscription or contribution to any such loans on the part of its subjects ? (2) How far will such transactions, and agreements arising out of them, be recognized as valid in the English Courts ? and (3) Under what circumstances, if any, will the participation in such a proceeding involve the parties to it, in penal consequences in English Law ?

On the first point there appears to be a considerable discrepancy between the views of the text writers and actual usage. By the former, the prohibition, which certainly applies to the neutral State itself, of not contributing aid whether in arms or money to either belligerent, is frequently extended to loans made by neutral subjects. But neither in principle nor in practice does it seem, that there is anything to warrant this view, where the loan is made *bonâ fide* and as a commercial transaction. If, indeed, such a contribution were made by a body of neutral subjects, *animo belligerendi*, then it might be illegal, and if carried to any extent it might become incumbent on the neutral State to intervene. Thus in 1823 (probably on the occasion of a proposed loan in aid of Greek independence) the law officers of the English Crown gave an opinion to the following effect : (1) That subscriptions in aid of one belligerent by subjects of a neutral nation were inconsistent with neutrality and contrary to the Law of Nations, but that the other belligerent would not have a right to consider them as an act of hostility on the part of the Government, although they might afford just ground of complaint if carried to any considerable extent ; (2) but that loans for the same purpose, entered into merely with commercial views, would not be an infringement of neutrality, although if under colour of a loan, a gratuitous contribution was afforded without interest or at a merely nominal interest, such a transaction would be illegal. The views of the United States on the subject were clearly stated in 1842 by Mr. Webster. Replying to a complaint made by Mexico in regard to a loan by United States citizens to the Texan insurgents, he says : " As to advances and loans made by individuals to the Government of Texas, the Mexican Government hardly needs to be informed that there is nothing unlawful in this, so long as

Texas is at peace with the United States, and that these are things which no Government undertakes to prevent." During the Franco-German war, both the French Morgan loan and part of the North German Confederation loan were issued in England.

Hence we may conclude, that whilst a voluntary subscription, if carried to any considerable extent, would be an infraction of neutrality, and afford a just ground of complaint to the other belligerent, yet a loan raised in a neutral country as a purely commercial transaction, on which interest was *bonâ fide* undertaken to be paid, would be perfectly legitimate. As Mr. Hall points out, money is in theory and in fact an article of commerce, and to throw upon neutral Governments the obligation of controlling dealings in it taking place within their territories, would be to set up a solitary exception to the fundamental rule that States are not responsible for the commercial acts of their subjects (*k*). It would, moreover, throw upon neutral States a responsibility which they would be wholly unable to meet.

The next point for consideration is strictly a question of municipal law, viz., how far will the English Courts recognize as valid, transactions and agreements arising out of loans made to a belligerent or insurgent Government? As to this, it may be well to premise, that the borrower under such circumstances may occupy one of three different positions. The loan may be raised on behalf of an insurgent force whose belligerency is not recognized; such was the position of the Cuban insurgents in the case of the *Virginius*. Or it may be raised on behalf of an insurgent colony or a revolted State, whose belligerency is, but whose independence is not recognized by other nations; such was the position of the Confederate States during the American Civil War. Or, lastly, the loan may be raised on behalf of one of two fully-recognized States, at war with each other, but in amity with Great Britain; such as was the case with France and Germany during the war of 1870.

On this subject there is a certain amount of judicial authority. In 1834, in the case of *De Wütz v. Hendricks* (9 Moo. C. B. 586), proceedings were instituted to recover a power of attorney and certain scrip receipts, that had been deposited with the defendant by the plaintiff, in relation to a loan proposed to be raised on behalf of the Greek insurgents. On the trial of the question of law before the judges of the Common Pleas, Best, C. J., referred with approval to an opinion which he had expressed in the Court below, "That it was contrary to the Law of Nations for any person residing in this country to enter into engagements by way of loan for the purpose of

(*k*) See Hall, p. 598.

supporting the subjects of a foreign State in arms against a Government in alliance with our own, and that no right of action could arise on such transactions." He referred also to a similar decision of the Lord Chancellor, in the case of a proposed loan to the subjects of the King of Spain, but, from a note to *De Wütz v. Hendricks*, it appears that the case referred to was not then reported. In another case of *Yrissari v. Clement* (11 Moo. C. B. 317), it was held that an action for libel would not lie for imputing to a party fraud in connection with an illegal transaction, the illegal transaction being the "raising of a loan for a State at war with one in amity with the Government of this country." This case also came before Best, C. J., who assumed throughout that the transaction was illegal. It will be observed that, while in *De Wütz v. Hendricks* the illegality was stated to consist in raising "a loan for supporting the subjects of a foreign State in arms against a Government in alliance with Great Britain," in *Yrissari v. Clement* it was extended to the case of a "loan to a State at war with one in amity with the Government of this country." The latter statement manifestly covers the case of a loan to one of two fully recognized States. But such a doctrine, if it could be sustained, would be fraught with the most inconvenient consequences to the mercantile community. If a loan of a purely commercial nature, made to a belligerent State, were illegal, then all agreements arising out of it would be equally tainted, and a subscription to such a loan, even though procured by fraud or misrepresentation, would afford no right of action (see *Thompson v. Powles*, 2 Simon, 194). In the case of *Yrissari v. Clement*, however, although the dictum of Chief Justice Best is as stated above, yet the facts show, that the question really at issue was the validity of a loan to an insurgent State. In an American case, *Kennet v. Chambers* (14 Howard, 38), a contract was made in Cincinnati after Texas had declared itself independent, but before its independence had been recognized by the United States, under which money was to be furnished to a general in the Texan army to enable him to raise and equip troops to be employed against Mexico. It was held that the contract was illegal and unenforceable; but the Court based its decision mainly on the fact that Texas had not yet been recognized by the United States Government, and expressly observed that it was not then necessary to decide, how far a judicial tribunal of the United States would enforce such a contract, when two States acknowledged to be independent were at war and that country remained neutral. Here, as in *De Wütz v. Hendricks*, it is clear that the illegality lay in the raising of a loan on behalf of a non-recognized State, the Court having expressly left the case of loan to a fully-recognized State out of its consideration.

On the whole, it would seem that the authority of these cases

must be confined to loans made to insurgent forces ; beyond this point they are neither sufficiently explicit nor direct to warrant our extending their principle to commercial loans on behalf of a fully recognised belligerent Power. Such cases, moreover, as *Seton v. Low* (1 Johnson, N. Y. Co. 1), *Ex parte Chavasse, re Grazebrook* (84 L. J. 17, Bank.), and *The Helen* (L. Rep., 1 A. & E. 1), though they relate primarily to other transactions, yet disclose the broad principle that contracts arising out of transactions which do not in themselves involve any violation of the neutrality of the State, are perfectly valid and enforceable in the English and American Courts. It is fair to conclude that, if a transaction is lawful by the Law of Nations, our own municipal courts will not pronounce it illegal without some express and direct authority. So far as loans to insurgent or non-recognized belligerents are concerned, there does appear to be such direct authority ; but there seems to be no authority of this kind where the loan is a commercial loan to a fully-recognized belligerent.

The last question that arises in connection with this subject is whether a subscription or contribution in aid of a belligerent or insurgent Power might not involve penal consequences in English law. In 1828, on the occasion before referred to, the law officers of the Crown were asked for their opinion "as to whether, having regard to the municipal law of Great Britain, there existed any, and what, means of proceeding against individuals and corporations engaged in such subscriptions." The English law officers reported that such subscriptions might subject the parties concerned in them to a prosecution for misdemeanour, on account of their obvious tendency to interrupt the friendship subsisting between this country and the other belligerents, and to involve the State in dispute, and possibly in the calamities of war. They went on to say, however, that such subscriptions had formerly been entered into without any notice having been taken of them by public authority ; that there appeared to be no instance of a prosecution for such an offence ; and they did not think that, even if the money had been actually sent, such a prosecution would be successful. They further reported that, if money had not been actually sent, a prosecution for conspiring to assist with money either belligerent would be attended with still greater difficulty ; and, that, in any case, criminal proceedings would not lie against a corporation, but only against such of its individual members as were proved to have acted in the transaction. In 1873 the question was again raised with respect to subscriptions raised in England on behalf of Don Carlos. On this occasion, Mr. Gladstone, in reply to questions put to him in Parliament, referred to the opinions given in 1828, and informed the House that, whenever information should

be given to the Government, from which there might appear any reasonable ground of expecting that an indictment for unlawful conspiracy to aid the invasion or disturbance of the peace of a foreign country at amity with us, could be maintained, the Government would be prepared to vindicate the law of the country. Mr. Gladstone on this occasion deprecated any alteration of the law, in view of the fact that the Legislature had not long before been engaged in recasting the Foreign Enlistment Act, and that it was not desirable that changes on the subject should be made from day to day. He also referred to the risk of giving to cases of the kind a factitious importance. On this subject, therefore, the English law appears to be somewhat ambiguous. In practice, however, such proceedings, if instituted at all, would probably be confined to cases where an organized effort was being made, *animo belligerendi*, to assist hostile operations against a Government at peace with Great Britain.

*NEUTRAL DUTIES (B).—ENGLISH AND AMERICAN
NEUTRALITY CASES.*

GIDEON HENFIELD'S CASE.

Temp. 1793.

[WEARTON'S STATE TRIALS, 49.]

Case.] In May, 1793, during war between Great Britain and France, Gideon Henfield, a United States citizen, took service on board the "Citizen Genêt," a French privateer. The captain of the ship subsequently gave him the post of Prize Master on board the ship "William," which had been captured from the British by the "Citizen Genêt," and in this capacity he arrived at Philadelphia. He was thereupon indicted for a breach of the neutrality laws of the United States.

Judgment.] In his charge to the jury, Wilson, J., stated that the United States being neutral, acts of hostility committed by Henfield constituted an offence punishable by the laws of the country; as a citizen of the United States he was bound to act no part which could injure his own nation, and was

bound to keep the peace in regard to all other nations with whom his own country was at peace. Such was the rule of conduct prescribed by the Law of Nations. Besides this, by the Constitution of the United States, all treaties made under the authority of the United States were part of the law of the land, and treaties of friendship existed with the Netherlands, Great Britain, and Prussia.

In spite of this ruling, however, the jury, after retiring several times, returned a verdict of not guilty.

Gideon Henfield's Case, Wharton's State Trials, 49.

This case is of importance as leading to the United States Neutrality Act of 1794. This Act was the foundation of the modern law of neutrality. It forbade (1) the acceptance of a commission, or enlistment in the army or navy of a foreign State; (2) the fitting out of or issuing of commissions to cruisers, the augmentation of force of war vessels, or the setting on foot of any military expedition for service against a friendly State. The President of the United States was also authorized to use the land or naval forces of the Union, to prevent the departure from the United States of vessels offending against the Act.

This Act remained in force till 1818, when it was replaced by another Neutrality Act. By this Act the following persons were declared liable to fine and imprisonment: (1) Citizens of the United States accepting commissions to serve a foreign Government at war with another Government with which the United States were at peace; (2) Any person enlisting or procuring another to enlist in the service of a foreign State; (3) Any person taking part in the fitting out or arming of vessels destined to cruise against a State with which the United States were at peace, or issuing a commission to any such vessels, such vessels to be forfeited; (4) Citizens of the United States fitting out, arming, commanding, entering, or purchasing an interest in any vessel outside the United States, intended to commit hostilities against the citizens of another State or their property; (5) Any person augmenting within the United States the force of any armed vessel belonging to a foreign Government at war with another foreign Government with which the United States were at peace; (6) Any person setting on foot a military expedition against a State with which the United States were at peace. Power was also given to the President of the United States to employ such part of the land or naval forces or of the militia as might

be necessary, to compel any foreign ships to depart from the United States, in all cases, where by the Law of Nations or the treaties of the United States, they ought not to remain there. Owners of armed vessels sailing from the United States were required to give a bond that the ship should not be employed to cruise against any State at peace with the United States. Collectors of Customs were authorized to detain vessels built for warlike purposes and about to depart from the United States, when circumstances rendered it probable that they were intended to cruise against a State at peace with the United States, until the decision of the President on the matter should be given or a bond entered into.

THE UNITED STATES v. QUINCY.

Temp. 1832.

[6 PETERS, 445.]

Case.] The defendant in this case was charged in 1829 with having been concerned in the fitting out, in the port of Baltimore, of a vessel called the "Bolivar," with intent to employ her in the service of a foreign State, the United Provinces of Rio de la Plata, against the subjects and property of the Emperor of Brazil, with whom the United States were at peace. It was proved that the defendant had superintended the fitting out of the "Bolivar," and that her equipment was beyond that of a merchant vessel; also that she had left Baltimore with some warlike stores for St. Thomas, where she was ultimately fitted out as a privateer, and that she had then cruised under another name, and captured several vessels.

Judgment.] It was laid down by the Court, first, that if it were found that the defendant was concerned in fitting out the vessel with that intent he would be guilty, even though the equipment was not complete when the vessel left the United States, and the cruise did not commence until men were recruited and further equipments made at St. Thomas. Further, that, if when the vessel was equipped the owner intended her to go to the West Indies in search of funds wherewith to effect the armament, and had no present inten

tion of employing her as a privateer, the defendant could not be found guilty. Finally, that he could not be found guilty if he had no fixed intention to use her as a privateer, but merely a wish to do so, the fulfilment whereof depended on future arrangements.

The United States v. Quincy, 6 Peters, 445.

This case is cited as containing a clear exposition of United States views as to the liability of persons aiding in the illegal fitting out or equipment of a belligerent warship. In an earlier case, the *United States v. Guinet* (3 Dall. 321), it had been laid down that to aid in the conversion of a merchant vessel into an armed vessel, with a view to enabling her to cruise against the commerce of a friendly nation, was an offence against the United States Neutrality Act of 1794.

The case of the *United States v. O'Sullivan and Lewis* (note to Wharton's Criminal Law, 5th edition, vol. II. pp. 519—525) contains an elaborate account of the nature of the evidence in such cases.

THE ATTORNEY-GENERAL v. SILLEM AND OTHERS.

Temp. 1863.

[2 HURLSTONE AND COLTMAN'S EXCHEQUER REPORTS, 431.]

Case.] In this case the defendants were charged, under the British Foreign Enlistment Act, 59 Geo. III. c. 69, on an information by the Attorney-General, with equipping a vessel called the "Alexandra," with a view to her employment in the service of the Confederate States, against the United States, at the time of the American Civil War. The vessel was built at Liverpool for Messrs. Fraser, Trenholm, & Co., the agents of the Confederate States. After having been launched she was taken to Toxteth Dock for completion, and at the time of her seizure workmen were employed in fitting her with stanchions for hammock-nettings similar to those of a ship of war. The commander of one of Her Majesty's ships stated that she certainly was not intended for mercantile purposes, but that she might have been used as a yacht, and was easily convertible into a

man-of-war. On the trial of the case in the Court below, the Judge had made the liability of the defendant dependent on the presence of an *animus belligerendi*, and the defendants were acquitted. On motion for a new trial by the Attorney-General, the case was argued again at great length.

Judgment.] The Court at first were equally divided on the question as to whether there should be a new trial. The views of the Judges differed considerably as to the precise intent of the Foreign Enlistment Act on this question. Pollock, C.B., and Bramwell, B., were of opinion that what was forbidden by the statute of 1819 was such an equipment as would enable the ship immediately on leaving port in this kingdom to cruise or commit hostilities. Channell, B., held that if the equipment was doubtful, the defendants would still be liable if the ship was capable of being used for war, and there was an intent to that effect, even though at the time of her leaving she was not ready for immediate hostilities. Pigott, B., went further, and held that any act of equipment done with the prohibited intent was within the statute, but the learned Judge afterwards withdrew his judgment, and under these circumstances the rule for a new trial was discharged.

The Crown appealed to the Exchequer Chamber, but the appeal was disallowed on a technical ground, and the question never got beyond the stage mentioned above.

The Attorney-General v. Sillem and Others, 2 Hurlst. & Colt. Exch. Repts. 431.

So far as this case goes, it seems to show that the building in pursuance of a contract, of the hull of a ship suitable for war, but not equipped or fitted so as to enable her to cruise or commit immediate hostilities, even though there might have been an intent to sell and deliver her to a belligerent, was not deemed a violation of the Foreign Enlistment Act of 1819.

With regard to British neutrality legislation, the earlier statutes against foreign enlistment do not seem to have been framed with any view to the observance of neutral duties. Thus, 3 Jac. I. c. 4, and 1 W. & M. c. 8, made it felony to enter the service

of another State; 9 Geo. II. c. 30, made enlisting, or procuring his Majesty's subjects to enlist in foreign service, felony punishable with death, without benefit of clergy; 29 Geo. II. c. 17, amending the previous statute, inflicted a similar punishment on British subjects who engaged to enlist in foreign service, and also on persons engaging them, without licence from the Crown, subject to certain reservations in favour of the service of the States General. The object of these statutes seems to have been to guard against the recruitment of the forces of foreign States, and especially of the Jacobite pretenders, from amongst the disaffected subjects of the English Crown. The first real neutrality law was the Foreign Enlistment Act of 1819, which was passed in consequence of the part taken by British subjects in the war then prevailing between Spain and her American colonies. This Act (59 Geo. III. c. 69), after repealing previous statutes, made it a misdemeanour punishable with fine and imprisonment or either, at the discretion of the Court, for a British subject to enlist or engage to enlist in foreign service, naval or military, or to accept a commission, or to engage to go into a foreign country with intent to enlist, or to procure others to enlist; vessels engaged in carrying illegally enlisted persons were made liable to arrest and detention by the local authorities, and a penalty was inflicted on any master taking such persons on board; by the seventh and most important section, it was made a misdemeanour, punishable with fine and imprisonment or either, at the discretion of the Court, to fit out armed vessels, without the licence of the Crown, for employment against a friendly State, or to deliver commissions to ships for such purpose, or to augment the force of a foreign war vessel. The divergence of opinion which existed amongst the judges in the case of the *Attorney-General v. Sillem* affords some illustration of the difficulty of interpreting this section.

The subject is now, however, regulated by the provisions of the Foreign Enlistment Act, 1870, 33 & 34 Vict. c. 90. This Act owed its introduction to the disputes that arose between Great Britain and the United States, in connection with the depredations of the "Alabama" and her sister cruisers. The correspondence that ensued with the United States, had the effect of calling the attention of the English Government to the defects of the Foreign Enlistment Act of 1819; a special commission was appointed to enquire into and report upon the Act, and in consequence of its recommendations, the Foreign Enlistment Act of 1870, repealing that of 1819, was passed. By this Act it is made an offence punishable by fine and imprisonment, with or without hard labour: (1.) For any person within British jurisdiction, or for a British subject anywhere, to enlist without her Majesty's licence in the service of any foreign State at war with a friendly State, or to induce any other

person to do so ; (2.) For a British subject to leave, or to go on board any ship with the view of leaving, her Majesty's dominions in order to enlist in such service, or for a person to embark others under false representations, in order to induce them to enlist in such service ; (3.) For the master or owner of any ship to take illegally enlisted persons on board, the ship in this case being also liable to seizure. A similar penalty, in addition to the forfeiture of the ship and her equipment, is also imposed on the following acts : (1.) Building, equipping, or despatching a ship with reasonable cause for belief that it will be employed in the service of a foreign State at war with a friendly State ; (2.) Issuing a commission to any ship to be employed for this purpose ; (3.) Aiding the warlike equipment of a ship with like intent ; or (4.) Aiding in the fitting out of any military expedition. These penalties, however, are not to apply to any person building or equipping a ship in pursuance of a contract made before war ; provided that, upon the proclamation of neutrality, such person gives notice to the Secretary of State, furnishes him with the prescribed particulars, and gives security against the removal of the ship before the termination of the war. Prizes captured in violation of British neutrality and brought into British ports are to be restored. The Secretary of State or Chief Executive Authority, if satisfied that a ship has been built, commissioned, or equipped contrary to the Act, or is about to be despatched contrary to the Act, may issue a warrant of arrest, and upon the issue of such warrant the local authorities may seize and detain the ship. Local authorities are also empowered to detain ships even without such warrant upon the receipt of information to the same effect, reasonably believed by them, the arrest or detention being reported then to the Secretary of State or Chief Executive Authority, and no responsibility being incurred, if this is done. The Secretary of State or Executive Authority may also grant a search warrant, for the purpose of searching any dockyard, in cases of suspicion.

This is probably the most stringent municipal statute at present existing. It is certainly more stringent than that which exists in the United States, and also more precise and more stringent than the neutrality regulations of other States (*U*). In many respects it goes beyond the requirements of International Law, as recognized by other nations. This fact, however, ought not to be regarded as enlarging Great Britain's international responsibility. Whilst, on the one hand, the fact of a nation failing to make any provision for giving effect to its international obligations would not exempt it from liability, in the event of these being broken, so on the other hand, the fact of its making regulations in excess of the require-

(*U*) See Excursus III., p. 282, *infra*.

ments of International Law, ought not to be allowed to magnify or extend its liability.

With regard to illegal enlistment, there seems to be no international rule, which would make a neutral State responsible for the unorganized and voluntary action of persons, who may subsequently and outside the limits of neutral territory join the forces of either belligerent. On the outbreak of the American Civil War in 1861, as it was thought probable that a large number of British subjects might take service on one side or the other, an express prohibition against such enlistment was inserted in the British Proclamation of Neutrality. On the outbreak of the Franco-German War in 1870, no such danger was anticipated, and consequently no express prohibition was issued. In this war a small number of English subjects did, in fact, enlist on both sides; this would undoubtedly have afforded good ground for proceeding against such individuals under the municipal law, but it was never suggested that their action in any way compromised the neutrality of their Government.

With regard to illegal expeditions, a neutral State is equally bound to use reasonable diligence to suppress and prevent any aid being given by its subjects or rendered from its territory, when such aid assumes the form and character of military array. This includes the fitting out and setting forth of organized expeditions from neutral soil against either belligerent; and also the fitting out or despatching of armed vessels for the purpose of cruising against either belligerent.

With respect to the despatch of armed vessels, it does not seem that International Law, strictly, requires a neutral State to prohibit the fitting out and despatching under the neutral flag, of a vessel suitable for war, to a belligerent port, where the object is only to dispose of her there as a commercial venture; although such a vessel would necessarily incur the risk of capture and condemnation by the other belligerent whilst *in transitu*. It would even seem that such a vessel might be sold and delivered to a belligerent within neutral territory without involving the neutral State, so long as the sale was not made by the State, and so long as the vessel herself left the neutral territory without commission, armament, or crew, such as would enable her to commit immediate hostilities. The proper foundation of liability in such cases, so far as the neutral State and its subjects are concerned, would seem to be the existence of an *animus belligerendi*, as distinct from the mere *animus vendendi* (m).

The Treaty of Washington, 1870, and the award of the Geneva Tribunal (n), may have altered the law in this respect as between

(m) See an article in North American Review, April, 1872, by Mr. J. N.

Pomeroy; quoted Phill. iii. 273.

(n) See p. 284, *infra*.

Great Britain and the United States. But these rules can scarcely be deemed binding on other nations, least of all on those who were not represented on the Commission. Nor was the decision of this tribunal, it must be remembered, altogether unanimous. The important position occupied by Great Britain and by the United States amongst maritime nations may, indeed, have the effect of recommending the principles laid down by the tribunal, for adoption by other nations, but this must be done either by express adherence, or by their being acted upon in practice. Until this occurs it cannot, in strictness, be maintained that there is, except as between Great Britain and the United States, any rule prohibiting the mere construction or despatch of vessels fitted for war, within or from neutral territory, so long only as this is done as a mercantile venture and not *animo belligerendi*. A usage tending to prohibit this may, indeed, be in course of growth, but it cannot be said, as yet, to have definitely established itself. Mr. Hall approves of such a usage, on the ground of the facilities which exist for converting a vessel of this type into a complete and immediate instrument of attack, but at the same time he points out that the question of responsibility ought to turn rather on the character of the vessel than on the intention of the parties (*o*).

THE "SALVADOR."

Temp. 1870.

[L. R. 3 P. C. 218.]

Case.] This vessel was seized under a warrant from the Governor of the Bahama islands, and proceeded against in the Vice-Admiralty Court of those islands, for breach of the 7th section of the Foreign Enlistment Act, 59 Geo. III. c. 69. The breach alleged was that the "Salvador" had been equipped for the purpose of aiding the Cuban insurgents.

Judgment.] The lower Court decided that the vessel was not liable, on the ground that the Cuban insurgents did not come within the terms of the statute. This decision, however, was overruled by the Judicial Committee of the Privy Council, on the ground that there was an insurrection in Cuba, that the insurgents had formed themselves into an organized body for the

purpose of undertaking and conducting hostilities, and that the vessel was to be employed in their service.

The Salvador, L. R. 3 P. C. 218.

This case is cited as illustrating the applicability of the provisions of the Foreign Enlistment Acts to the case of vessels fitted out in aid of insurgents (*p*).

THE "GAUNTLET."

Temp. 1870.

[L. R. 4 P. C. 184.]

Case.] During the Franco-Prussian War of 1870, a Prussian merchant vessel was captured in the Channel by a French man-of-war, and a prize crew under the command of a French naval officer was put on board. The prize was driven by stress of weather into the Downs, and anchored within British waters. After it had lain there for two days, the French Consul at Dover engaged an English tug to tow the vessel to the Dunkirk Roads. Proceedings were subsequently taken against the tug for procuring her condemnation, under the 8th section of the Foreign Enlistment Act, 1870 (*pp*), which enacts that if any person despatches any ship with intent that she shall be employed in the service of a foreign State at war with a State in amity with Great Britain, the ship and her equipment shall be forfeited.

Judgment.] It was held by the Judicial Committee of the Privy Council, reversing the decree of the Court of Admiralty, that the engagement by the owners of the tug, to tow the detached prize with her prisoners and crew to French waters, where they would be taken charge of by the French authorities, was despatching a ship within the meaning of the section, and the tug was therefore condemned as a forfeiture to the Crown.

The Gauntlet, L. R. 4 P. C. 184.

(*p*) For an account of other Cuban expeditions, fitted out in United States territory, see Wheaton, by Boyd, *pp*.

516, 517.

(*pp*) 33 & 34 Vict. c. 90.

Another decision under this Act was given in the case of the *International* (L. R. 3 A. & E. 321). In this case, during the Franco-Prussian War, an English company entered into a contract with the French Government for the laying down of certain submarine telegraph cables between different points on the coast of France. It appeared that, by means of short telegraph lines carried over land, the series of cables could be united into one line stretching from Dunkirk to Verdun. The undertaking was of a commercial nature, the object being to furnish postal telegraphy, and the contractors were in no way parties to any project for adapting the line to military purposes. The company shipped the cables on board the "*International*," a steamship belonging to them, but before the latter could quit port, she was arrested by the British authorities, on the ground that she was about to be despatched contrary to the provisions of the Foreign Enlistment Act. On the application of the owners, it was held that they were entitled to have the ship released, in spite of the fact that the line when complete might be partially used for military purposes; the Court held that this probability was not sufficient to divest the line of its primary commercial character, or to clothe the service to be rendered by the ship with a military or naval character within the meaning of the Act; inasmuch, however, as the Court was of opinion that there was a reasonable and probable cause for the detention, no order was made as to costs or damages.

NEUTRAL DUTIES (C).

CASE OF M. GENÉT.

Temp. 1793.

[AMERICAN STATE PAPERS, VOL. I.]

Case.] Soon after the outbreak of war between France and Great Britain in 1793, the President of the United States issued a Proclamation of neutrality which, amongst other things, prohibited United States citizens from aiding and abetting the hostilities which were proceeding between the belligerents. Notwithstanding this M. Genét, the French Minister accredited to the United States, on arriving at Charleston,

issued commissions to certain United States citizens. The latter, in virtue of the commissions, proceeded to fit out privateers, the crews of which were almost wholly recruited from United States citizens. By these vessels extensive depredations were committed upon British commerce.

The English Minister thereupon remonstrated with the United States authorities, contending that these proceedings of M. Genêt constituted at once a violation of the United States neutrality and an insult to their sovereignty. He also demanded restitution of such of the vessels captured by the privateers sailing under M. Genêt's commissions, as had been brought into United States ports. Mr. Jefferson, in a communication addressed to the United States Minister at Paris, a copy of which was sent to M. Genêt, intimated that it was the right of every nation to prohibit acts of sovereignty from being exercised within its limits by another nation, and that it was further the duty of a neutral to prohibit such as would injure either of the belligerents; he laid down that the granting of military commissions within the United States by any other authority, was an infringement of their sovereignty, especially when granted to United States citizens with a view to induce them to do acts contrary to the duties they owed their country. On the question of restitution there was some difference of opinion between the members of the United States executive. Ultimately measures were taken by order of the President of the United States for restoration of the prizes. A remonstrance was thereupon made by M. Genêt, who asserted that the 22nd Article of the Treaty of Commerce between the United States and France, expressly authorized French ships to arm in the United States ports, whilst forbidding this to the ships of any other nation. The United States, however, did not admit this interpretation of the treaty, and the recall of M. Genêt was subsequently demanded.

Case of M. Genêt, American State Papers, Vol. I.

It is an abiding merit of the United States, that their action in this case had the effect of fixing and defining the present law relating to the issue of commissions, and enlistment of troops by a belligerent, within the limits of neutral territory. Such acts were denounced as a violation of neutral sovereignty and as inconsistent with the duties which the neutral State owed to the other belligerent. Acting on this view of its obligations the United States Government also issued instructions to the collectors of customs, under which, the equipment of vessels of a nature solely adapted for war, within the ports of the United States, and the enlistment of United States citizens, were proclaimed as illegal. "The policy of the United States in 1793, constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinions as to what those obligations were. In the main, however, it is identical with the standard of conduct which is now adopted by the community of nations" (g).

THE TEROEIRA AFFAIR.

Temp. 1830.

[HANSARD'S PARLIAMENTARY DEBATES, N. S., VOL. XXIII., p. 737.]

Case.] In 1827, Don Pedro, King of Portugal, renounced the throne in favour of his daughter Donna Maria, and appointed his brother, Don Miguel, regent, retaining to himself the Empire of the Brazils. Shortly afterwards Don Miguel usurped the throne of Portugal, and the country was thrown into a state of civil war. Don Pedro's ministers called upon the European Powers to interfere and drive the usurper from the throne, the application being more especially addressed to Great Britain, on account of the treaties subsisting between the countries. Great Britain, however, refused to interfere, on the ground that the treaties referred to merely provided that Great Britain should furnish Portugal with auxiliaries in the event of a foreign invasion.

(g) See Hall, p. 524.

Meanwhile a number of Portuguese refugees having arrived in England took up their residence in Portsmouth and the vicinity. The British Government, suspecting that these persons were endeavouring to fit out an expedition against the *de facto* Government of Portugal, with the cognizance of the Brazilian Government, gave notice to the Brazilian Ambassador that such an expedition could not be allowed to be fitted out here. The ambassador stated in reply that the ships, which were being fitted out, were destined for Brazil. In consequence of this assurance, 4 ships with 652 hands on board, under the command of General Count Saldanha, were allowed to depart. The British authorities were, nevertheless, led to suspect that the true destination of the expedition was Terceira, one of the Azores Islands. They consequently despatched Captain Walpole with a small squadron to Terceira, with instructions to prevent the Portuguese expedition from disembarking. These instructions were duly carried out, and the Portuguese expedition was sent back.

The action of the English Government in the matter was approved by a majority in Parliament; but according to Sir Robert Phillimore, the true principles of International Law on the subject are set forth in the protest made in the House of Lords and in the resolution moved in the House of Commons.

Protest in the House of Lords.] The protest in the House of Lords reprobated the action of the Government, "Because the forcible detention or interruption by a neutral, of the subjects of a belligerent State, upon the high seas or within the legitimate jurisdiction of either of the belligerents, constitutes a direct breach of neutrality, and is an obvious violation of the Law of Nations. And such an act of aggression, illegal and unjust at all times against a people with whom the interfering Power is not actually at war, assumed in this instance a yet more odious and ungenerous aspect, inasmuch as it was exercised against the unarmed subjects of a defenceless and friendly Sovereign, whose elevation and right to the Crown of Portugal had been earnestly recommended and openly recognized by His

ment had recognized the existence of civil war between Spain and her colonies, each party must be deemed a belligerent nation, enjoying the sovereign rights of war and entitled to be respected in the exercise of those rights.

The next question was whether the prizes had been captured in violation of the neutrality of the United States, by reason of an original unlawful construction and outfit of the capturing vessels in United States territory. As to this it appeared that the "*Independencia del Sud*" had been loaded with munitions of war and sent to Buenos Ayres as a commercial adventure, the supercargo being authorized to sell the vessel to the Buenos Ayres Government, if a suitable price could be obtained. This was ultimately done, and the vessel was then commissioned by the Buenos Ayres Government. As to this, the Court held that there was nothing in the Law of Nations that forbade the sending of armed vessels, as well as of munitions of war, to foreign ports for sale; it was a commercial adventure, which only exposed the persons engaged in it to the penalty of confiscation in the event of capture by the other belligerent. There was, therefore, no pretence for suggesting that the original outfit for the voyage was illegal, or that a capture made after the sale was, for that cause alone, invalid.

A further question was raised as to a subsequent augmentation of the force of the vessel within United States territory. As to this it appeared that after the sale at Buenos Ayres the vessel had put into Baltimore, where she was received as a public ship, and that a considerable number of persons had enlisted on board her. On this point the Court held, that in default of proof to the contrary, such persons must be presumed not to have been subjects of Buenos Ayres; that such an illegal augmentation of force was a violation of the Law of Nations as well as of the United States neutrality laws; and that it infected and invalidated all captures made during that cruise, but not captures made before or afterwards. The Court therefore affirmed the decree of restitution which had been made by the District Court.

In reply to various other objections urged by counsel for the captors, the Court laid down :—(1.) That though a public vessel was herself exempted from proceedings *in rem* for captures effected in violation of United States neutrality, yet in respect of jurisdiction over the prizes themselves, if brought within United States territory, there was no distinction between those of a public vessel and those of a privateer ; (2.) That a public vessel could not communicate her privilege of exemption to her prizes so as to preclude the legality of their capture being inquired into ; (3.) That a decree of condemnation by a Buenos Ayres Court, after proceedings had been commenced in the United States Courts, could not oust the jurisdiction or defeat the judgment of the latter, the possession and title of the captors having been divested by the seizure of the property and the institution of proceedings in the neutral tribunal.

The Santissima Trinidad, 7 Wheaton, 283.

Amongst the important principles laid down in this case, it may be worth while to recall the following :—(1.) The commission of the captain of a public vessel is *primâ facie* evidence of her public character ; (2.) The recognition of the belligerency of a revolted province gives its Government a right to issue commissions and to exercise other belligerent rights ; (3.) According to the then view of the United States court, the mere sale by a neutral individual of a war ship to a belligerent Government, was not a breach of neutrality but a mere export of contraband, which merely had the effect of subjecting the property whilst on its way to the risk of capture and confiscation by the other belligerent (*l*) ; (4.) An illegal outfit and augmentation of force in neutral territory will have the effect of vitiating all captures made during the succeeding voyage ; (5.) If a violation of neutrality has taken place, all prizes brought within neutral ports will become subject to neutral jurisdiction, and restitution ; (6.) The fact of a decision having been given in the case by the Prize Court of the belligerent, after proceedings have been instituted in the neutral court, will not suffice to exclude the neutral jurisdiction.

With regard to violation of neutral territory by augmentation of

(*l*) This principle, however, needs considerable qualifications since the "Alabama" controversy, so far, at least, as Great Britain and the United States are concerned.

force, it should be noted that mere replacement of force will not be considered as having this character. In the case of *Moody v. The Phæbe Anne* (3 Dall. 319), it appeared that, in the course of the cruise in which the capture had taken place, the captor, a French privateer, had entered Charleston to repair, and that whilst the repairs were being effected her mast, sails, and armament had been removed, but subsequently replaced without any material addition; it was held under these circumstances that no decree for restitution could be made.

LA AMISTAD DE RUES.

Temp. 1820.

[5 WHEATON, 385.]

Case.] A Spanish ship had been captured by the Venezuelan privateer "La Guerriere," but was subsequently taken possession of by a detachment from the United States ketch "Surprise," and brought into New Orleans. A claim was made by the original Spanish owners for restitution, on the ground that an illegal augmentation of the crew of the privateer had taken place within the United States. The Court below decreed restitution to the original Spanish owners with damages, and the Venezuelan captors appealed against the decree.

Judgment.] Story, J., after reviewing the evidence as to the illegal augmentation, came to the conclusion that it was not free from reasonable doubt. In cases where the aid of a neutral Court was sought against a belligerent capture, the burden of proof rested on the party seeking such aid; to justify restitution, the violation of neutrality should be clearly made out. The present case not being free from reasonable doubt, the decree of restitution to the original owners, made by the Court below, was overruled.

With regard to the claim of the original owners for loss of market, the learned Judge held that such claim would have been inadmissible, even if restitution to the original owners had been decreed. In the case of marine torts it had been

held that the probable profits could not be taken into account. The doctrine of the Court was that whenever a capture was made in violation of neutrality, if the prize came within the jurisdiction it should be restored to the original owners, subject to the violation of neutrality being clearly established. But the Court had never carried its jurisdiction farther than decreeing restitution and costs of suit, and it now disclaimed all right to inflict damages for plunderage. Neutral nations might inflict penalties for violation of neutrality, but they did so in vindication of their own rights, and not by way of compensation to the injured belligerent.

La Amistad de Rues, 5 Wheaton, 385.

This case is cited as illustrating the legal aspect of neutral jurisdiction when there has been a violation of neutral territory by either belligerent. Such jurisdiction is not so much exercised for the purpose of compensating the injured belligerent, as in pursuance of what is at once a neutral right and a neutral duty, viz., the preservation of its own territory from violation by either belligerent

THE "ALABAMA."

Temp. 1872 (u).

[PAPERS RELATING TO THE TREATY OF WASHINGTON, VOLS. I. TO IV.,
PUBLISHED AT WASHINGTON, 1872—1873.]

Case.] The "Alabama" was built at Liverpool by Messrs. Laird & Co., and was launched in May, 1862, during the American Civil War. She was known originally as No. 290, but was evidently intended as a vessel of war. The United States Minister in London wrote on the 23rd of June to Lord Russell, pointing out that the vessel was about to leave, with the view of entering the service of the Confederate States. On the 30th, the law officers of the Crown advised that if sufficient evidence could be

(u) This of course refers to the date of the discussion and award; see p. 280, *infra*.

obtained to justify proceedings under the Foreign Enlistment Act, they should be taken as early as possible. Up to the 15th of July the commissioners advised that there was not sufficient evidence. Sir Robert Collier, however, advised on the 16th that there was. The opinion of the law officers of the Crown was again asked, and they then advised the detention of the vessel; their opinion was not, however, made known until the 31st of July, and on the 29th the "Alabama" had sailed unarmed from Liverpool. She proceeded to the Azores, where she was fully equipped as a vessel of war, her armament and ammunition together with a large number of recruits having been brought out to her by the "Agrippina" and the "Bahama," both of which vessels had cleared from British ports. She was then commissioned as a Confederate cruiser, and soon afterwards destroyed the United States ship of war "Hatteras." She then put into Jamaica, where she arrived on the 20th of January, 1863. At that time she was a commissioned ship of war, and as such, in the opinion of the British authorities, protected from seizure. Some repairs were done to her, and she left that port on the 25th. On a subsequent occasion, the "Alabama" having put into Saldanha Bay in Cape Colony for repairs, the United States Consul wrote to the Governor of the colony, protesting against the ship being allowed to remain in any of the ports of the colony; the Governor wrote in reply that the vessel would leave port as soon as the repairs were completed. The law officers of the Crown, when subsequently called upon for their opinion as to what had taken place at the Cape, advised that no authority at the Cape could exercise any jurisdiction over the ship, and that, whatever her previous history, they were bound to treat her as a ship of war belonging to a belligerent power. On subsequent occasions the "Alabama" put into various British ports, and was allowed to take coal and effect repairs without interference. On the 11th of June, 1864, she entered Cherbourg, where she was challenged by the United States war steamer "Kearsage;" an encounter between the two vessels took place on the 19th and in the

result the "Alabama" was destroyed. A claim was made by the United States Government on account of the "Alabama's" depredations, mainly on the following grounds: (1.) That she was constructed, fitted out, and equipped within the jurisdiction of Great Britain, with intent to cruise against the United States, Great Britain having had reasonable ground to believe that such was the intent, and not having used due diligence to prevent what was being done; (2.) That as she was constructed and armed within British jurisdiction, and as the construction and despatch of the vessel and arms had taken place at a British port, and the British authorities had ample notice of the fact, the whole must be regarded as a hostile expedition from a British port against the United States; (3.) That Great Britain did not use due diligence to prevent the departure of the vessel from Liverpool, or subsequently from Kingston, Singapore, or the Cape; (4.) That no orders for her detention were sent out; (5.) That she received excessive hospitality at Cape Town, being allowed to coal before three months had expired from her coaling at Singapore.

It was also contended that the responsibility for the ship included responsibility for the acts of her tender, the "Tuscaloosa" (x).

The Alabama, Papers relating to Treaty of Washington, Vols. I. to IV. (Publ. at Washington, 1872, 1873) (y).

(x) As to the "Tuscaloosa," see p. 275, *infra*.

(y) The decision of the Geneva Tribunal as to this and the other

vessels in respect to which claims were made by the United States, will be found in the Geneva award, p. 280, *infra*.

THE "FLORIDA."*Temp.* 1872.[PAPERS RELATING TO THE TREATY OF WASHINGTON, PUBLISHED AT
WASHINGTON, 1872—1873.]

Case.] The "Florida" was also built at Liverpool during the American Civil War. She was known by the name of the "Oreto," and it was stated, at the time, that she was being built for the Italian Government. Representations as to her real destination were made to the British authorities by the American Consul at Liverpool; but as these were deemed to be unaccompanied by sufficient evidence the vessel was not interfered with, and ultimately cleared for Palermo and Jamaica. She was seized at the Bahamas, and proceedings for her condemnation were taken, but she was discharged on the ground that she had shipped no munitions of war in the colony, and that there was no evidence of her having been transferred to a belligerent. She then proceeded to Green Cay, where she was equipped as a war vessel. Her armaments had meanwhile been prepared at Liverpool, conveyed by train to Hartlepool, and thence brought out to her by the "Prince Alfred." She also enlisted some men at Nassau, and endeavoured, without success, to enlist others at Cuba. She next went to Mobile, having succeeded in eluding the blockading squadron; she remained there upwards of four months, and then issued forth as a Confederate ship of war, in which character she committed extensive depredations on Federal commerce. During all this time the "Florida" was admitted to British ports and treated as a belligerent cruiser. She continued her career until she was seized by the United States ship "Wachusett," at Bahia, in October, 1864.

After the war claims were made by the Government of the United States against Great Britain, in respect of the "Florida." The grounds of complaint urged were: (1.) That when she left Liverpool she was intended to cruise and carry on war against the United States; (2.) That she was fitted

out and equipped within British jurisdiction ; (3.) That Great Britain had reasonable ground to believe that such fitting out and equipment were taking place ; (4.) That she had there been specially adapted to warlike uses ; (5.) That Great Britain had possessed both the right and the power of preventing her departure, but had failed to do so. It was also urged that both the "Florida" and other vessels ought to have been seized on entering British ports. To this argument three answers were given, 1st. That the Government had not the right to seize them, seeing that when they came again into British ports they were admitted as the commissioned ships of war of a belligerent State ; 2ndly. That the Government could not as a neutral Government seize a belligerent ship of war for what was a violation, not of neutrality, but only of its own municipal law ; 3rdly. That even if it had the right, it was under no obligation to exercise it.

The Florida, Papers relating to Treaty of Washington, Vols. I. to IV. (Publ. at Washington, 1872, 1873).

THE "SHENANDOAH," "NASHVILLE," "SUMTER," AND "GEORGIA."

Temp. 1872.

[PAPERS RELATING TO THE TREATY OF WASHINGTON, VOLS. I. TO IV.,
PUBLISHED AT WASHINGTON, 1872—1873.]

Case.] The "Shenandoah" was originally a British merchant vessel known as the "Sea King." During the American Civil War she was purchased by the Confederate authorities, and cleared for Bombay. Troops were brought out to her by the "Laurel," and she was transformed into a Confederate cruiser off the island of Madeira, and subsequently preyed on Federal commerce in the southern seas. On the occasion of her putting into Melbourne to repair, the United States Consul

made remonstrances to the Governor of the Colony. Notwithstanding these, the "Shenandoah" was allowed to effect repairs and to take in supplies and coals. She also appears to have surreptitiously enlisted recruits during her stay at Melbourne. Subsequently to her departure she captured several United States vessels.

The grounds of the claim made by the United States against Great Britain in respect to the "Shenandoah" were: (1.) That she was fitted out and armed in British territory for the purpose of cruising against the United States, Great Britain having had reasonable ground to believe that such was the case, and not having used due diligence to prevent it; (2.) That on her coming again within British jurisdiction, when all the facts were notorious, the British authorities had refused to prevent her departure, claiming the right to treat her as a commissioned vessel of war, and to permit her to depart as such; (3.) That she twice received within the British jurisdiction large recruitments without due diligence being used to prevent this; (4.) That she was allowed to effect repairs, and receive coals and supplies, and in fact to make British territory the base of her operations.

Claims were also made in respect to the "Nashville," the "Sumter," and the "Georgia." The general grounds of claim were their reception in British ports and the supplies of coal furnished to them. In respect of the "Georgia," which was a British built ship, it was also contended that effective measures to prevent her equipment and her departure from Great Britain had not been taken.

The Shenandoah, Nashville, Sumter, and Georgia, Papers relating to Treaty of Washington, Vols. I. to IV. (Publ. at Washington, 1872 and 1873).

THE "TUSCALOOSA."*Temp.* 1872.

[PAPERS RELATING TO THE TREATY OF WASHINGTON, VOLS. I. TO IV.,
PUBLISHED AT WASHINGTON, 1872—1873.]

Case.] In 1863, during the American Civil War, a United States merchant vessel, known originally as the "Conrad," was captured by the "Alabama." Captain Semmes, of the "Alabama," changed the name of the prize to the "Tuscaloosa," and put an officer and crew of ten men on board, together with two small guns; he then brought her to the Cape of Good Hope, and requested her admission as a tender to his vessel. At the instance of the United States Consul the question was raised whether the vessel, not having been regularly condemned, ought not to be regarded merely as a prize and consequently as inadmissible into neutral territory. The Attorney-General of the colony advised that if the "Tuscaloosa" had received her armament from a duly commissioned Confederate vessel, and was commanded by a person holding a commission, she was entitled to be treated as a public vessel. She left Table Bay in August and returned in December. Meantime the opinion of the law officers of the Crown in England had been taken. Their opinion differed from that of the Attorney-General of the Cape, in so far as they considered that the vessel did not cease to have the character of a prize, because she was, at the time of being brought within British waters, armed with two small guns, in charge of an officer, and manned with a crew of ten men from the "Alabama," and in fact used as a tender to that vessel. They were also of opinion that the allegations of the United States Consul should have been communicated to Captain Semmes while the "Tuscaloosa" was in British waters; that he should have been requested to state whether he admitted them, and that on his refusal to do so he should have been called upon to produce the ship's papers; and, in the event of the ship having proved to be an uncondemned prize, it was suggested as a matter deserving

consideration, whether the exercise of any further control over her by the captors should not have been prohibited, and the vessel kept under British control until reclaimed by the original owner.

Subsequently the "Tuscaloosa" returned to the Cape, and was seized by the Colonial authorities. Thereupon a protest was made by her commander, on the ground that she had been previously treated as a war vessel. The law officers were again consulted and advised that the seizure could not be justified, in view of her previous recognition as a war vessel. Orders were consequently given to restore the "Tuscaloosa" to her late commander, or if he should have left the Cape to retain her until she could be handed over to some person authorized by Captain Semmes or the Confederate States to receive her. The ship was not given up, but remained in the custody of the local authorities till the end of the war, when she was delivered up to the United States. After the war the United States made the treatment of the "Tuscaloosa" by the British authorities a subject of claim against the British Government. The United States also contended that the responsibility of the British Government for the acts of the "Alabama" included liability for the acts of her prizes.

The Tuscaloosa, Papers relating to the Treaty of Washington, Vols. I. to IV. (Published at Washington, 1872 and 1873).

It was subsequently held by the Geneva tribunal, that Great Britain was liable for the damage sustained by reason of the acts of the "Tuscaloosa," and other tenders to the "Alabama." The case therefore illustrates the extent to which claims for consequential damages may be entertained in such cases as that of the *Alabama*.

The case also contains some important expressions of opinion as to the position of prizes brought by a belligerent captor into neutral territory. With regard to these, it is generally admitted that the neutral must not permit any Prize Court to be erected within his territory. But International Law does not, as yet, require the neutral to prevent a belligerent from bringing his prizes into a neutral

port, or from selling them there after condemnation in his own country. This principle is not altogether logical. As between the captor and the original owner of the prize, effective seizure may be a sufficient title ; but as between the captor and all other persons, something more is required to complete the title, namely the condemnation of the prize by a competent Prize Court. Until this has occurred, therefore, the title of the captor is only inchoate, and in bringing his prizes into a neutral port, he brings within neutral jurisdiction property to which he has not as yet acquired a complete title. Nevertheless, except where expressly forbidden by municipal regulations, the neutral State usually disclaims jurisdiction, and the belligerent is permitted to retain the prize until it has been condemned in his own Prize Court, and thereafter to sell her if he so desires. Where, however, its neutrality has been violated by the capture, the neutral Government ought to restore the prize (2).

Although, within these limits, there is no further obligation incumbent on the neutral, yet by the municipal regulations of various States the sale and deposit of prizes within neutral territory are frequently forbidden. Thus, on the 1st of June, 1861, instructions were dispatched from the British Foreign Office to the Commissioners of the Admiralty, to the effect that neither war vessels nor privateers of the parties engaged in the American Civil War, should be allowed to carry their prizes into British jurisdiction. On the 10th of June, 1861, a similar proclamation was made by the French Government. In 1870, on the outbreak of the Franco-German War, instructions were issued by the British Government to the effect that no armed ships of either party should be allowed to bring prizes made by them into the ports, harbours, roadsteads or waters of the United Kingdom, or of any of Her Majesty's colonies or possessions abroad. A similar course was also taken by other neutral States. It seems not improbable that this will ultimately become an obligation of International as well as of municipal law, subject, however, to the recognition of a right of entry in circumstances of danger or distress.

(2) See p. 235, *supra*.

THE "TUSCARORA" AND THE "NASHVILLE."*Temp. 1861—1862.*

[BERNARD'S BRITISH NEUTRALITY DURING AMERICAN CIVIL WAR, 267.]

Case.] During the American Civil War, the Confederate cruiser, the "Nashville," put into dock at Southampton. Thereupon, the United States corvette "Tuscarora" also proceeded to Southampton, and took up her station at the head of Southampton Water, with the object of preventing the "Nashville" from leaving the harbour. The "Tuscarora" employed agents in Southampton, who gave her prompt notice of impending departure on the part of the "Nashville." By keeping up steam and riding with slips on her cable, the "Tuscarora" was thus enabled to precede the "Nashville" whenever the latter proposed to depart. It is a well established rule of International Law, that when the cruisers of two belligerents enter a neutral port one shall not be allowed to leave within twenty-four hours of the other. The "Tuscarora" thus precluded the "Nashville" from leaving for twenty-four hours. Before the twenty-four hours had elapsed the "Tuscarora" returned to her station, repeating the operation whenever she was advised that the "Nashville" intended leaving. The "Nashville" was thus practically blockaded in an English port.

*The Tuscarora and the Nashville, Bernard's British
Neutrality during American Civil War, 267.*

A belligerent war vessel has usually permission to enter neutral ports in time of war, and to take provisions water and coal, subject to such limitations as may be imposed by municipal law (a). She may refit as against the casualties of the seas, but must not enlist men, or make additions to her armament, or commit any of the acts previously described as offences against neutrality. This practice is subject to some qualifications. For instance, privateers are not infrequently excluded altogether from neutral ports, save in case of

(a) See p. 318, *infra*.

distress, whilst even public vessels, if they have committed any infringement of neutral rights, may be similarly prohibited.

In the case of a war-ship belonging to one belligerent and any other vessel, whether a war-ship or not, belonging to the other belligerent, being found in a neutral port simultaneously, the custom has grown up of prohibiting the former from leaving within twenty-four hours of the latter. This twenty-four hour rule has now been adopted by Great Britain, the United States, France, Italy, and Holland, and extends both to public ships and also to privateers in cases where the latter are permitted to enter at all. It was this rule which was taken advantage of by the "Tuscarora."

The action of the latter had the effect of calling the attention of the British Government to the defects of the existing rule, and in order to guard against a similar occurrence, it was provided by a British Order in Council, that any vessel of either belligerent entering a British port during the war might be compelled to depart within twenty-four hours after entrance, except in case of stress of weather, need of repairs, or want of provisions or other things necessary for the subsistence of her crew, and that in such cases the authorities were to require her to put to sea as soon as possible after the twenty-four hours. In 1870, on the occasion of the Franco-German War, an Order in Council was issued by the British Government to the effect that any ship of war belonging to either belligerent putting into any British port, should be required to depart within twenty-four hours after her arrival, except in case of stress of weather, or of her requiring provisions or repairs; and that in either of such cases she should be required to put to sea as soon as possible after such period had elapsed, and should be permitted to take only such supplies as were necessary for her immediate use. It was further provided that where any vessels belonging to the hostile Powers should put into the same port, an interval of not less than twenty-four hours should elapse between the departure from the port of any such vessel of one belligerent, and the subsequent departure of any ship of war of the other belligerent; the earlier rule being relaxed so far as necessary to give effect to this proviso. Similar regulations were also made by other neutral States.

THE GENEVA ARBITRATION AND AWARD.*Temp.* 1872.[PAPERS RELATING TO THE TREATY OF WASHINGTON, VOLS. I. TO IV.,
PUBLISHED AT WASHINGTON, 1872—1873.]

Events leading to the Arbitration.] During the continuance of the American Civil War, representations were from time to time made by Mr. Adams, the United States Minister in London, to the British Government, concerning the different vessels which were alleged to have been fitted out, or to have committed acts in violation of British neutrality. In his correspondence he pointed out the material facts relating to the cases, and suggested that means should be taken to prevent the departures of the vessels. All consequent losses suffered by the United States were submitted to the British authorities.

In February, 1863, Mr. Adams called the attention of Earl Russell to the following facts:—(1.) That contracts were then already made for the construction of ironclad fighting ships in England; (2.) That Fraser, Trenholm & Co. were the depositaries of the insurgents at Liverpool, and that the money in their hands was to be applied to the contracts; (3.) That they were to pay for purchases made by Confederate agents; (4.) That contracts for the construction of other vessels besides the ironclads referred to, had been taken in Great Britain; (5.) That parties in England were arranging for an insurgent cotton loan, the proceeds of which were to be deposited with Fraser, Trenholm & Co., for the purpose of carrying out such contracts.

In April, 1865, after hostilities had virtually terminated, Mr. Adams informed Earl Russell that the United States Government held the British Government responsible for what had occurred. Besides direct damages, claims were made for indirect damages, arising from the fact that, in consequence of the outfit of the vessels referred to, a large proportion of the American commercial marine had been transferred to Great Britain, the rates of insurance had become

higher, the war had been prolonged, and the cost of quelling the rebellion had thereby been increased.

On the 26th of October, 1863, Mr. Adams had proposed to Earl Russell "some fair and conventional form of arbitrament and reference" for the settlement of the claims. In 1865, Earl Russell, referring to that offer, declined on behalf of the British Government either to make any compensation for the captures made by the "Alabama," or to refer the question to any foreign State. In the same letter, referring to the claims for indirect damages, it was pointed out that if the liability of neutral nations was stretched so as to include such claims as these, a maritime nation, whose people occupied themselves in constructing ships and cannon and arms, might be made responsible for the whole damages of a war in which that nation had taken no part. In 1866, a change of ministry took place in England, and Earl Russell's reply to the United States demands was reconsidered by the Derby Cabinet, and a long negotiation was entered on. A convention on the subject was signed in London in November, 1868, but this proved unacceptable to the United States Senate. Negotiations were, however, renewed, and in the result a treaty known as the Johnson-Clarendon Convention was concluded in January, 1869. By that convention, provision was made for the appointment of a mixed Commission, with jurisdiction over all claims on the part of the United States against Great Britain, including the "Alabama" claims, and all claims on the part of Great Britain against the United States, arising since July, 1853. The treaty did not, however, receive the assent of the United States Senate, in consequence of its not stating in sufficiently unequivocal terms that all national claims were included. On the 15th of May, Mr. Motley, on behalf of the United States, informed Lord Clarendon, who conducted the negotiations on behalf of Great Britain, that the United States, in rejecting the treaty, "abandoned neither its own rights nor those of its citizens." Towards the end of 1870, a special envoy was sent to the United States by the British Government for the purpose of settling the differences which

had arisen out of the Fisheries Question, and, in January, 1871, Sir Edward Thornton proposed the appointment of a Joint High Commission for this purpose. Mr. Fish, on behalf of the United States, suggested that the commission should also deal with the "Alabama" claims, and, in consequence of this suggestion, commissioners were appointed by the two countries; Lord de Grey, Sir Stafford Northcote, Professor Bernard, Sir Edward Thornton, and Sir John Macdonald, acting on behalf of Great Britain; and Mr. Hamilton Fish, General Schenck, Mr. Justice Nilson, Mr. Ebenezer Hoar, and Mr. George H. Williams, acting on behalf of the United States.

The United States commissioners suggested that a sum should be agreed upon, to be paid by Great Britain to the United States, in satisfaction of all claims, but this proposal was not acceded to on the part of Great Britain. The British commissioners then suggested that the principle of arbitration should be adopted. The American commissioners replied that they could not consent to arbitration unless the principles to govern the arbitrators in their consideration of the facts were previously agreed upon. The British commissioners, on the other hand, suggested that the facts only should be submitted to the arbitrators, and they should be at liberty to decide upon them, after hearing such arguments as might be necessary. Ultimately certain rules proposed by the American commissioners were agreed to by Great Britain, and after a discussion lasting over several weeks, a treaty, known as the Treaty of Washington, was concluded on the 8th of May, 1871.

By this Treaty all claims known as the "Alabama" claims were to be referred to five arbitrators, to be named as therein mentioned; the arbitrators were to meet at Geneva; provision was made as to the mode of procedure; finally, the arbitrators were to be governed by three rules agreed upon by the parties as applicable to the case.

Rules governing the Arbitration.] The following are the rules referred to:—A neutral government is bound: (1.) To use due diligence to prevent the fitting out, arming, or equipping

within its jurisdiction of any vessel, which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace, and also to use the like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted in whole or in part within such jurisdiction to warlike use; (2.) Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies, or arms, or the recruitment of men; (3.) To exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

With regard to these rules the English Government intimated that whilst it could not assent to them as a statement of the principles of International Law in force at the time when the claims arose, yet the arbitrators might assume that it had agreed to act upon the principles set forth in the rules.

It was further provided by the Treaty that the tribunal should decide whether Great Britain had failed in any of her duties in regard to each vessel. Minute provisions were also inserted as to the mode of determining the amount of the claims (b).

The Arbitration.] In pursuance of the Treaty an arbitration was held at Geneva, the meetings extending from the 15th of December, 1871, to the 14th of September, 1872. The tribunal was composed of Sir Alexander Cockburn, representing Great Britain, Mr. Charles Francis Adams, representing the United States, Count Sclopis, nominated by the King of Italy, Mr. Staempfli, nominated by the President of the Swiss Republic, and the Vicomte d'Itajuba, nominated by the Emperor of Brazil.

A preliminary question was raised as to the competency of the tribunal to deal with the indirect claims. The majority of the

(b) Other clauses of the Treaty related to the Fisheries Question and to the settlement of the Pacific boundary. The former question was settled for the future, the existing claims being re-

ferred to a commission. The latter question was referred to the Emperor of Germany. See Appendix, pp. 351 to 353, and 357, *infra*.

tribunal expressed their opinion that those claims did not constitute, upon the principles of International Law applicable to such cases, a good foundation for an award of compensation, or for computation of damages as between nations, and should therefore be wholly excluded from the consideration of the tribunal in making its award, even if there were no disagreement between the two Governments as to the competency of the tribunal to decide thereon. This opinion was accepted by the President of the United States as determinative of the arbitrators' judgment upon the question, and the claims were withdrawn from the consideration of the tribunal.

On the main issue, the general grounds of complaint urged against Great Britain were: (1.) That British territory was, during the whole struggle, permitted to be used as the base of the naval operations of the insurgents; (2.) That the insurgents had been allowed to make use of British territory as an arsenal and base of supplies; (3.) That Great Britain had displayed a continuing partiality for the insurgents; (4.) That there was a want of due diligence to prevent the acts complained of (c).

The Award.] On the 26th of August, 1872, the arbitrators, after laying down several important principles relating to the interpretation of the rules of the Treaty of Washington upon which their decision was based, came to the following conclusions:

(1.) With respect to the "Alabama," four of the arbitrators held that Great Britain had failed to fulfil the duties prescribed by rules (1) and (3), on the ground that, notwithstanding the warnings given her, she omitted to take effective preventive measures; that the measures taken for the pursuit and arrest of the vessel were imperfect; that the vessel was on several occasions freely admitted into British colonial ports instead of being proceeded against; and finally that the British Government had failed to justify such want of due diligence.

(2.) With respect to the "Florida," four of the arbitrators held that Great Britain had also failed in the observance of her

(c) As to the grounds of complaint in respect of each particular vessel, see pp. 269 to 279, *supra*.

neutral duties as defined by the Treaty; that such failure had occurred, both in respect to the original construction and outfit of the vessel, her subsequent admission into British ports, and her treatment by the colonial authorities; as appeared from the facts relative to the stay of the vessel at Nassau, her issue from that port, her enlistment of men, and her receipt of supplies and armament at Green Cay.

(3.) With respect to the "*Shenandoah*," the arbitrators unanimously held that Great Britain had not failed to fulfil any of its duties anterior to the entry of the vessel into Melbourne; but three were of opinion that there had been a failure in respect of the duties prescribed by rules (2) and (3), after her entry into Hobson's Bay, inasmuch as there was negligence on the part of the Melbourne authorities, especially in connection with the augmentation of force there.

(4.) With respect to the "*Tuscaloosa*," "*Clarence*," "*Taconey*," and "*Archer*," tenders to the "*Alabama*" and "*Florida*," a majority of the tribunal held that Great Britain was responsible in respect of them.

(5.) With respect to the other vessels, the tribunal held that Great Britain had not failed to fulfil any of its duties.

(6.) Three of the arbitrators held that damages in respect of the costs of the pursuit of the cruisers should not be awarded, inasmuch as those costs were not properly distinguishable from the general expenses of the war.

(7.) It was unanimously held that damages in respect of prospective earnings should not be awarded, inasmuch as they could not properly be made the subject of compensation, depending as they did upon future and uncertain contingencies.

(8.) The tribunal, by four votes to one, awarded to the United States \$15,500,000 as an indemnity.

The principles of interpretation on which the arbitrators proceeded were as follows: (1.) The "due diligence" referred to in the rules mentioned above, ought to be exercised by neutral governments in proportion to the risks to which either belligerent may be exposed by their failure to fulfil their neutrality

obligations ; (2.) The circumstances out of which the matter in controversy arose, were such as to call for the exercise by the British Government of all possible solicitude for the observance of the rights and duties involved in Great Britain's declaration of neutrality ; (3.) The effects of a violation of neutrality through the construction, equipment, and armament of a vessel, are not done away with by any commission, which the government of the belligerent may afterwards grant to the vessel, and the ultimate step by which the offence is completed cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence : (4.) The privilege of extritoriality accorded to war ships has been admitted into the Law of Nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality ; (5.) The absence of a previous notice cannot be regarded as a failure in any consideration required by the Law of Nations, in those cases in which a vessel carries with it its own condemnation ; (6.) In order to impart to supplies of coal a character inconsistent with the rule prohibiting the use of neutral ports or waters as a base of naval operations, it is necessary that the supplies should be connected with special circumstances of time, person, or place which may combine to give them such character.

The Geneva Arbitration and Award, Papers relating to the Treaty of Washington, Vols. I. to IV. (Publ. at Washington, 1872, 1873).

The rules of the Treaty of Washington, and the principles of interpretation laid down by the arbitrators seem to have been unfavourably commented on both by jurists and politicians. The Treaty itself has been found fault with, as affirming a neutral obligation to use due diligence, without making any attempt to define or ascertain what due diligence is. The exposition of due diligence given by the tribunal has been assailed as even more perilous. It is suggested that such a vague extension of the previously existing rules will

merely afford a pretext for future claims without affording any means of deciding them, and so tend to multiply international disputes.

It is no doubt true that both the rules and the principles of interpretation are somewhat loosely expressed. Still, it is necessary to remember that it is as impossible in International as it is in municipal Law, to set up any exact standard of diligence. Decisions and supplementary rules may gradually mark out the limits of care required in special cases, but outside these limits the vague standard of reasonable or due care must inevitably obtain, and this, moreover, must vary with prevalent conditions and necessities. If this be so, then there is nothing particularly anomalous in making the diligence required from the neutral vary with the nature of the war and the circumstances of either belligerent.

A more serious difficulty is, that the result of the award was to make a neutral State responsible for the consequences of separate acts, such as that of building, and that of procuring or purchasing materials for armaments, (each of them innocent according to the then accepted principles of International Law), by reason of a subsequent combination outside neutral territory, which the neutral State was powerless to prevent. As Mr. Hall points out (*d*)—"Responsibility is the correlative of power; if a nation is to be responsible for innocent acts which become noxious by combination in a place outside its boundaries, it must be able to follow the authors to the place where the character of the acts becomes evident, and to exercise the functions of sovereignty there." But even on the high seas this would be scarcely permissible, except possibly in the case of some positive and direct violation of neutral territory; much less would it be permissible within the waters of a foreign State. "The true theory is that the neutral Sovereign has only to do with such overt acts as are performed within his own territory and to them he can apply only the test of their immediate quality" (*e*).

The limitation imposed by the arbitrators upon the principle of the extritoriality of public vessels has also been found fault with. But it is necessary to remember, first that the doctrine of extritoriality is merely a rough method of describing certain immunities resting on comity and ascertained by usage, and that it cannot, consistently with other fundamental doctrines, be converted into an independent source of legal right; and secondly that the proposed limitation ought to have the effect of rendering the discharge of neutral obligations far easier than it would otherwise be. It is difficult, indeed, to see how such a restriction is likely in any way to fetter the legitimate privileges of those public vessels that have been guilty of no violation of neutral jurisdiction. On the other hand, if there were no such a limitation, it would only be necessary to furnish a ship,

(*d*) See Hall, p. 611.

(*e*) See Hall, p. 611.

fitted out under circumstances involving the most flagrant violation of another nation's neutrality, with a commission, in order to secure her complete immunity from the consequences of her wrong-doing.

The principles of the Treaty of Washington will no doubt constitute International Law for the future between Great Britain and the United States ; but it can scarcely be maintained that they will be binding upon other nations ; nor will the principles of interpretation adopted by a majority of the arbitrators necessarily bind other tribunals. As between other nations the earlier rules of the Law of Nations on this subject will still continue to prevail, until supplanted by a definite usage to the contrary, or by an express acceptance of new principles (*ee*). According to the earlier rule, a vessel suitable for war may be sold to a belligerent and may be despatched from neutral territory, as long as it starts from such territory without a commission, armament, or crew such as would enable it to commence immediate hostilities ; or it may be despatched for possible sale to a belligerent in a foreign port, as a matter of mercantile venture, subject only to the risk of capture as contraband of war (*f*). Arms and munitions may be purchased by a belligerent within, or despatched to a belligerent from neutral territory, subject only to the risk of capture and condemnation by the other belligerent as enemy property, or as contraband of war. A belligerent vessel may still be permitted to refit and take supplies, subject to the qualification that there must not be such a continuous use of the neutral port, as would serve to make the neutral territory a base of hostile operations. The uncombined elements of an expedition may start from neutral territory as long as they are incapable of proximate combination into an organised whole. A usage may, indeed, be in course of growth tending to forbid the mere construction and despatch of vessels adapted for war, but this cannot, as yet, be said to have acquired the force of an admitted rule.

EXCURSUS III.—NEUTRALITY REGULATIONS OF FOREIGN STATES.

The following appear to be the neutrality regulations of some of the more important maritime Powers other than Great Britain and the United States :—

BELGIUM (*g*).

By general provisions, penalties are imposed on any person who shall expose the State to war, or subject any Belgian subject to

(*ee*) See p. 258, *supra*.

(*f*) See the *Santissima Trinidad*, p. 265, *supra*.

(*g*) These and other neutrality regu-

lations have been selected from the Appendix to the Report of the Neutrality Laws Commissioners, dated 1868.

reprisals. Belligerent vessels are also prohibited from remaining in Belgian ports for more than twenty-four hours, unless detained by stress of weather.

DENMARK.

Privateers are forbidden to enter Danish ports, except on account of stress of weather or pursuit by an enemy. Foreign vessels of war and privateers are forbidden to send their prizes to, or sell them in Danish ports, and Danish subjects are forbidden to purchase prizes brought in. Special rules are laid down for the navigation of ships during the existence of hostilities.

FRANCE.

Penalties are imposed upon any person who by hostile acts shall expose the State to war, or any French subject to reprisals.

The Code Civile also forbids French citizens from enlisting in the service of a foreign State without the permission of the French authorities.

ITALY.

The Italian Naval Code contains provisions to the following effect :—(1.) In case of war between foreign Powers, privateers or war vessels with prizes are not to be received, except in case of stress of weather ; (2.) No war ship or privateer shall remain in an Italian port beyond twenty-four hours, except in case of stress of weather, shipwreck, or absence of means for navigation (*h*) ; (3.) Prizes are not to be sold or exchanged in Italian ports ; (4.) Ships of friendly Powers, although belligerent, are to be at liberty to remain in Italian ports when their objects are exclusively scientific ; (5.) Belligerent ships are not to obtain arms or ammunition in Italian ports, or augment their force under pretence of repairs ; (6.) Food commodities and means of repair, necessary for the sustenance of the crew and safety of navigation, can alone be supplied to war ships or belligerent privateers ; (7.) Coals are not to be furnished until a certain time after arrival, in the case of belligerent war ships and privateers ; (8.) Where war vessels of two belligerent nations are found together in an Italian port, twenty-four hours must elapse between the departures ; and this interval may be increased under special circumstances ; (9.) Acts of hostility within the territorial waters of the State are to be deemed a violation of its neutrality.

HOLLAND.

It appears that, in 1868, there were no special laws applicable to this subject ; but that the Government was authorized in some cases

(*h*) This is apparently subject to the provisoes of (8).

to make use of Articles 84 and 85 of the Penal Code, in order to prevent any violation of its neutrality. The subject would probably be dealt with by special rules made on the outbreak of war.

PRUSSIA.

Hostile acts committed by a Prussian anywhere, or by a foreigner in Prussia, against a foreign State or its ruler, are punishable, if the same acts committed against the King of Prussia would amount to high treason. Whoever enlists or causes the enlistment of a Prussian subject in a foreign military service, or attempts so to do, is punishable with imprisonment.

By the Prussian Penal Code, the following acts are also made penal :—(1.) Assembling or commanding armed bodies of men without authority, or furnishing with arms or the necessaries of war, a body of men known to be assembled without the permission of the law ; (2.) Taking part in such armed meeting ; (3.) Secretly, or in defiance of the authorities, storing up arms or ammunition by anyone not in the trade. In these cases a confiscation of the stores also takes place. These provisions, though of general application, would, it seems, meet the case of a belligerent making use of Prussian territory as a base of operations, or for the purpose of fitting out a hostile expedition against another belligerent.

RUSSIA.

By Article 259 of the Russian Penal Code, any Russian subject who, in time of peace, openly attacks a foreign country, and thereby subjects his own country to the danger of war, is rendered liable to punishment.

Besides the regulations above referred to, many States appear from time to time to have made regulations applicable to particular wars.

On the outbreak of the Crimean War in 1854, the Government of Sweden and Norway issued a statement of its view of the obligations imposed upon it as a neutral State. These were :—(1.) To abstain from all participation in the conflict in favour of one, or to the detriment of the other, of the contending parties ; (2.) To admit into its ports the ships of war and merchant vessels of either belligerent, subject (*a.*) to the reservation of the right to deny entrance of ships of war into certain fortified ports, (*b.*) to the observance by all vessels of such sanitary and police regulations as circumstances rendered or might render necessary, and (*c.*) to the exclusion of all privateers both from ports and roads ; (3.) To accord to vessels of either

belligerent facilities for supplying themselves with provisions and stores, other than articles in the nature of contraband of war ; (4.) To prohibit, except in cases of distress, the entrance, condemnation, or sale of prizes within its ports. Subject hereto, it was claimed that Swedish and Norwegian vessels should enjoy full security and all necessary facilities in their commercial relations with the countries at war, save only in the case of declared and effective blockade, in which case the regulations generally established and recognized were to be observed. A similar manifesto was issued by the Danish Government.

On the outbreak of the American Civil War, 1861, the French Government issued a decree prohibiting French subjects from accepting commissions or letters of marque from either belligerent, or from assisting in the equipment or armament of war ships or privateers belonging to either belligerent. On the same occasion, the Belgian Government issued a proclamation to the effect that anyone, who, being subject to the law of Belgium, should take part in the preparation of any armament in favour of either belligerent, or should commit acts in derogation of neutral duty, would be liable to be treated as a pirate abroad, and would be subjected to the utmost rigour of the law in Belgium. The Spanish Government also issued a decree forbidding the construction or outfit of privateers within its territory, the acceptance of letters of marque, the assisting in the preparation of belligerent armaments or in the outfit of vessels of war, the carriage of provisions, war material or despatches for either belligerent, or enlistment in the naval or military service of either belligerent. The Brazilian Government issued a decree to the effect that a belligerent who committed any violation of its neutrality should not be readmitted into Brazilian waters, and that vessels attempting any violation of neutrality should be compelled to depart and be prohibited from taking even provisions.

In 1864 the Italian Government issued a decree prohibiting the war vessels or privateers of a belligerent from making use of Italian ports for military purposes, or for procuring arms or ammunition, or for augmenting their force, or for the deposit of their prizes ; and further prohibiting Italian subjects from taking service on the warships or privateers of either belligerent, or from accepting commissions or letters of marque, or from assisting in the construction or outfit of a belligerent war vessel or privateer.

RIGHTS AND LIABILITIES OF NEUTRAL TRADE.

THE "ATLAS."*Temp.* 1801.

[3 C. Rob. 299.]

Case.] During war between Great Britain and Spain, a cargo of tobacco was dispatched from the United States, on board an American ship, "to Vigo or some other market." The cargo was consigned to the master for the purpose of sale. At Vigo it was sold to the Spanish Government, the master having agreed to deliver it at Seville. On the voyage from Vigo to Seville the ship was captured by a British cruiser, and brought in for adjudication.

Judgment.] The cargo, even though laden on a neutral ship, was condemned on the ground that it was taken whilst going to an enemy's port to be delivered there to an enemy, and to be paid for by him, having actually become his property under an engagement entered into by the agent appointed for the management of the cargo. The contract under which it went was absolute and indefeasible; the goods could be considered in no other light than as the property of an enemy. The ship was restored; but freight was refused, as the cargo had been captured in course of a voyage, in which the vessel was engaged in the coasting trade of the enemy.

The Atlas, 3 C. Rob. 299.

The decision in this case seems to have followed that of the *Sally* (1795, cited in note to *Atlas*, 3 C. Rob. 300). In this case the House of Lords had decided that a cargo of wheat dispatched on board an American vessel, during war between Great Britain and France, nominally on account and at the risk of certain American merchants or their assigns, but really intended for the Mayor of Havre, was liable to condemnation as enemy property, even though captured on a neutral vessel.

The leading case, however, is cited rather for the purpose of illustrating the liabilities incurred by a neutral vessel engaged in carrying enemy property, according to the doctrine originally followed by the English courts, and still in force in respect to those States that have not signified their adhesion to the Declaration of Paris, 1856.

On the subject of the liability of enemy property on neutral vessels, and neutral property on enemy vessels, two distinct principles have at different times prevailed. According to one principle, the nationality of the property determined its liability to capture. Under this doctrine neutral goods went free, even though found on hostile ships, and hostile goods were liable to seizure even though found on neutral ships. While this principle prevailed, a captor who took hostile goods out of a neutral ship was in general liable to pay freight to the neutral shipowner, as shown by the judgment in case of the *Bremen Flugge* (i). On the other hand, a belligerent capturing a hostile ship with neutral goods on board, was entitled to claim freight if he forwarded the goods to their original destination. This is illustrated by the case of the *Fortuna* (k). This was the rule usually acted upon by Great Britain, and also by the United States except where modified by treaty. Thus Mr. Jefferson, the United States Foreign Secretary, writing to the American Minister accredited to France in August 1793, stated that it had long been an established principle of the Law of Nations, that the goods of a friend were free in an enemy's vessel, and an enemy's goods lawful prize in the vessel of a friend; but that the inconvenience of this principle, which subjected neutral vessels to the risk of being stopped at sea and searched, had induced several nations to substitute by treaty, the rule that free bottoms should make free goods, and enemy bottoms enemy goods; so far as this rule had been introduced it depended entirely on the treaties stipulating it, and formed an exception in special cases to the general operation of the Law of Nations; the United States had introduced it into their treaties with France, Holland, and Prussia, and they wished also to establish it with other nations; but this required the consent of such other nations, and meanwhile they had a right to act on the general principle. The same rule was also acted upon by the United States Courts, and laid down by American jurists (l).

According to the other principle, the nationality of the ship determined liability to capture. Under this doctrine neutral goods found on hostile ships were liable to confiscation, while hostile goods found on neutral ships went free. Neutrals were interested in the establishment of this principle, inasmuch as under it their maritime

(i) See p. 297, *infra*.

(k) See p. 295, *infra*.

(l) See the case of the *Nereide*, 9

Cranch, p. 388, and Kent's Commentaries, i., 123.

traffic was likely to be greatly increased. This principle was generally adopted by France and other Continental Powers.

The two propositions, however, which the latter principle involves, viz., that free ships make free goods, and enemy's ships make enemy goods, were not necessarily concurrent. The doctrine of "Free ships free goods" was frequently adopted without the corresponding doctrine "Hostile ships hostile goods" (*m*). Thus in the case of the *Cygnat* (2 Dods. 299), during war between Great Britain and the United States, a Spanish cargo on board a British ship was taken by an American privateer and retaken by a British man-of-war; the title of the recaptors to salvage on the cargo turned on the question whether the cargo would have been liable to condemnation in the United States courts; it appeared that by the Treaty of Commerce between Spain and the United States it was stipulated that free ships should make free goods; the recaptors argued that from the stipulation referred to, it was fairly to be inferred that enemy's ships should make enemies goods; the Court, however, was of opinion that the mere argument of inference did not warrant such a conclusion, and rejected the claim of the recaptors, on the assumption that the United States courts would not have condemned the Spanish cargo even though it was being carried by a British ship.

(1) The earlier principles which prevailed on this subject have now been extensively modified by treaty and convention. On the outbreak of the Crimean War Great Britain, by an Order in Council dated 28th March, 1854, announced her intention of waiving the right of seizing enemy property on neutral ships, except contraband of war; and this without derogating from the previous immunity which neutral goods on enemy vessels had enjoyed under her rule. France, on the other hand, acceded to the principle of the immunity of neutral goods on enemy ships, without qualifying the principle on which she had previously acted, as to the immunity of hostile goods on neutral ships. After the termination of the war, the following principles in regard to neutral trade in time of war, were adopted by the various Powers who were parties to the Treaty of Paris 1856, and embodied in a formal Declaration—(1.) That the neutral flag should cover an enemy's goods except contraband of war; and (2.) That neutral goods, except contraband of war, should not be liable to capture even under the enemy's flag. Both these and the other principles of the Declaration of Paris have now been acceded to by all civilized States, except the United States, Spain, and Mexico (*n*).

(*m*) For a history of these principles, including an account of the First Armed Neutrality of 1780, and the Second Armed Neutrality of 1800, the reader is referred to Woolsey, *International Law*, p. 316.

(*n*) The other principles of the Declaration of Paris were (1) "Privateering is and remains abolished," see p. 140, *supra*; (2) "Blockade to be binding must be effectual," see p. 303, *infra*.

Thus, as between all maritime nations of any importance, except the United States, Spain, and Mexico, neutral goods are now exempt from capture on enemy vessels, whilst enemy goods enjoy the same immunity on neutral vessels. It would seem, however, that according to the doctrine of the French prize courts, although neutral goods found on board an enemy vessel are not liable to condemnation, yet the neutral owner is not entitled to compensation if his goods should be destroyed by the action of the belligerent. In the case of the *Norwaerts* (nn), it appeared that, during the Franco-Prussian War, a German vessel had been captured by a French cruiser and burnt, the captor not having the means of taking the prize into port; the cargo was the property of Messrs. Gabriel & Co., an English firm, and an application was subsequently made on Messrs. Gabriel's behalf for compensation, on the ground that the destruction of English goods was contrary to the Declaration of Paris of 1856; the application was, however, refused by the Conseil d'Etat, it being held that the Declaration of Paris gave neutrals no right of indemnity against losses arising from lawful capture, or from acts of war accompanying or succeeding such a capture. This decision was followed in the case of the *Ludwig*, in which the facts were similar to those of the *Norwaerts*.

THE "FORTUNA."

Temp. 1802.

[TUDOR'S LEADING CASES, 1041; 4 C. ROB. 278.]

Case.] During war between Great Britain and the United States, the "Fortuna," an enemy's ship, laden with a cargo of corn, was captured by the British, and brought in for adjudication. The ship was condemned, but the cargo was restored as neutral property, and was forwarded to Lisbon, its original destination, where the consignee was put into possession. The case came before the Court on an application by the captors for freight (oo).

Judgment.] Sir William Scott, in his judgment, held them entitled to freight, on the same principle as that on which a captor would not have been entitled if he had not proceeded with and performed the original voyage. The specific contract

(nn) See Dalloz, 1872, Part III., p. 94.

(oo) Security having been previously

given to abide the decision of the Court on this point.

was performed in the one case and would not have been performed in the other. This was in accordance with the principle laid down in the case of the *Vreyheid*, that the captor who had performed the contract of the vessel was, as a matter of right, and *de cursu*, entitled to freight; although if he had done anything to the injury of the property, or had been guilty of any misconduct, he might remain answerable for the effect of such misconduct or injury, by way of set-off against him.

The Fortuna, Tudor's Leading Cases, 1041; 4 C. Rob. 278.

Under the rule, usually acted on by Great Britain, in virtue of which the nationality of the property determined its liability, the captor who took an enemy vessel with neutral goods on board, was entitled to be paid freight, if he forwarded the goods to their destination.

The same rule was applied where the goods belonged to subjects of the belligerent effecting the capture, the goods being restored, subject to payment of freight, except where liable to condemnation as having been engaged in illegal trade with the enemy. Thus in the case of the *Diana* (5 C. Rob. 67), some Dutch ships had been captured, apparently in anticipation of the war which afterwards broke out between Great Britain and Holland, whilst on a voyage from the Dutch colonies to Amsterdam; the cargoes belonged to British subjects and were ultimately destined for Great Britain, although by the law of Holland they had to be taken in the first instance to Holland; the ships were condemned, but the cargoes were restored to the British owners; the matter then came before the Court on the question of the liability of the owners to pay freight to the captors. Sir William Scott, in his judgment, stated that the owners had obtained restitution in their own country, and in the very port which they would have elected, if they had not been prevented by the law of Holland, and under these circumstances he held that they were liable for freight.

This rule is not affected by the Declaration of Paris. As between the parties to that Declaration, neutral goods on hostile ships, go free, as they did under the prior British rule. But whilst exempt from confiscation, the captor will nevertheless be entitled to freight, as before, if he forwards the goods to their destination.

THE "BREMEN FLUGGE."

Temp. 1801.

[TUDOR'S LEADING CASES, 1045 ; 4 C. ROB. 90.]

Case.] During the war which prevailed at the beginning of this century, between Great Britain and France, the "Bremen Flugge" was captured by a British vessel, and brought in for adjudication. The vessel herself was subsequently released as a neutral vessel, but part of the cargo was condemned as enemy property. Part of the proceeds of the sale of the condemned cargo was paid over to the owners of the vessel in discharge of freight, and the present action was brought to determine the question whether, under a decree for expenses, the captor or the master was first entitled to the residue of the proceeds.

Judgment.] Sir William Scott, in giving judgment, stated that a neutral had a right to carry the property of the enemy, but subject to the right of the belligerent to bring in the ship for the purpose of procuring condemnation of the cargo. It was generally held that a neutral vessel so engaged was not subject to any penalty, and that she was even entitled to her freight as a lien attaching to the cargo. The freight attached as a lien, provided there were no unneutral circumstances in the conduct of the ship to induce a forfeiture of the demand. The learned judge went on to say, however, that a claim for expenses was not a claim which the neutral was entitled to urge on the same ground, or in the same manner as a claim for freight, and he therefore held that, after payment of freight, the captor's claim to the residue of the cargo was to be preferred to that of the neutral master under a decree for expenses.

The Bremen Flugge, Tudor's Leading Cases, 1045 ;
4 C. Rob. 90.

Under the earlier rule acted upon by Great Britain, on the capture of enemy goods on board a neutral vessel, the neutral became entitled to freight, capture being deemed equivalent to delivery. Subject to

this, however, the belligerent captor was entitled to the residue, in preference to any other claims that might be made by the neutral.

As between the parties to the Declaration of Paris, hostile goods in neutral ships go free, and questions of this nature are no longer likely to arise, save in the case of a war, to which one of the nations not acceding to the Declaration of Paris may be a party.

DARBY v. THE BRIG "ERSTERN."

Temp. 1782.

[2 DALLAS, 34.]

Case.] During war between Great Britain and the United States, the Island of Dominica capitulated to the United States. Thereupon commercial intercourse between Great Britain and the island was prohibited. Certain British subjects subsequently attempted to evade this prohibition, by trading through the medium of Ostend, a neutral port. In the present case, it appeared that the brig "Erstern," a neutral ship, had cleared from London with a cargo belonging to British subjects ostensibly for Ostend. She arrived at Ostend, but subsequently cleared for Dominica with the cargo brought from London. The vessel was captured by a United States cruiser on the ground of having intended a violation of the capitulation of the island, and was brought in for adjudication. She was acquitted by the local Court of Admiralty, but on appeal, the decree was reversed, and the brig and cargo condemned on the ground that the ship had exceeded the rights accorded to neutral vessels.

Judgment.] The Court, in its judgment, stated that if the vessel had been employed in a fair commerce, such as was consistent with the rights of neutrality, the cargo, though the property of an enemy, would not have been liable to condemnation; inasmuch as it had been provided by Congress that the rights of neutrality should extend protection to the goods of an enemy on a neutral ship (*o*). But where the rights of neutrality

(*o*) Holland was apparently one of those countries with which the United

States has adopted by treaty the principle of free ships, free goods.

were exceeded, Congress had not enacted that a violated neutrality should afford such protection, nor could this have been done without confounding all distinctions between right and wrong.

Darby v. The Brig Eastern, 2 Dall. 34.

This case is cited as illustrating the principle that even where, by treaty, the neutral flag covers the goods, yet it must not be made the medium of an illicit trade. This limitation is equally applicable under the rules now established by the Declaration of Paris (*p*). Although the neutral flag may cover hostile goods, this will not warrant its being used for the purpose of carrying on an illicit traffic.

BLOCKADE.

THE "BETSEY."

Temp. 1798.

[TUDOR'S LEADING CASES, 1013 ; 1 C. ROB. 93.]

Case.] During war between Great Britain and France, the "Betsey," an American ship, was taken by the British at the capture of Guadaloupe. The island was within six weeks recaptured by the French, and the property in the "Betsey" thus became vested in the French recaptors. The first captors were thereupon called upon to proceed to adjudication, by the original owners of the property. The latter claimed to hold the captors liable for the value of the property, on the ground that the ship and cargo were neutral property which had not been engaged in any unlawful traffic, and that the capture had therefore been, from the first, unlawful. The first seizure was, on the other hand, defended on the ground that the ship had broken the blockade of Guadaloupe. It appeared that previous to the capture of the

(*p*) See pp. 294 and 297, *supra*.

island, the English had proclaimed it to be in a state of blockade, but that no actual blockade had been established.

Judgment.] It was laid down in the judgment, that in order to apply the law of blockade, three things must be proved: first, the existence of an actual blockade; secondly, the knowledge of the party; and thirdly, some act of violation either by going in or coming out with a cargo laden after the commencement of the blockade. It was therefore held, that so far as the question of breach of blockade was concerned, the case would have been one for restitution.

The Court then proceeded to consider whether in view of this fact, and of the fact that the property had been retaken with the island by the French, the captors remained liable to the American owners. This depended on the question whether the possession of the original captors was in its commencement a legal and *bonâ fide* possession; and if so, on whether it had become, by any subsequent conduct of the captors, tortious and illegal. It was held to be clear law that a *bonâ fide* possessor was not responsible for casualties (such as the recapture by the French); but that he might by subsequent misconduct forfeit the possession of his fair title, and render himself liable to be considered as a trespasser *ab initio*, and hence responsible for such casualties. Applying these principles to the case in question, the Court pronounced the original seizure justifiable on the ground that, as the British forces were at the time advancing against the Island of Guadaloupe, and as the planters would have been eager to avail themselves of neutral services to screen their property, strong suspicions attached to all ships found in the harbours of Guadaloupe, and afforded a reasonable ground for their detention. Neither could the captors be held to have vitiated their original fair title, so as to render themselves responsible for subsequent casualties, by any irregularity or unnecessary delay. The recapture having followed so closely on the original seizure, it did not seem that there had been either an opportunity for erecting a prize court on the spot, or for sending

the ship home for adjudication. Under the circumstances the captors were therefore discharged from all further proceedings.

The Betsey, Tudor's Leading Cases, 1013 ; 1 C. Rob. 93,

This case is cited, mainly, as containing an authoritative statement of the law on the subject of Blockade. But it also embodies an important principle as to the liability of a captor for casualties affecting the prize whilst under his control. On this subject, it was held, that although the prize might not, in the result, prove liable to condemnation, yet if the circumstances were such as to warrant her provisional arrest or detention, then the possession of the captor would be a *bonâ fide* possession, which would exempt him from liability for subsequent casualties, not arising through his own default.

Blockade is the obstruction of passage to or from a place by land or sea (*q*). Its object is to cut off all communication in the nature of commerce with the place blockaded (*r*). Neutrals are, however, seldom affected by land sieges, and blockade generally takes effect on a seaport, a roadstead, a portion of the coast, or the mouth of a river.

The usual and regular mode of enforcing blockades is, in the words of Sir William Scott, "by stationing a number of ships and forming, as it were, an arch of circumvallation round the mouth of the prohibited port. Then if the arch fails in any one part the blockade fails altogether." (1 Dods. 425.) The ships must be stationed in such numbers and in such a manner as to cause danger to any vessel endeavouring to enter. The essentials of liability for breach of blockade are (1) the existence of an actual blockade ; (2) knowledge of the party, and (3) some act of violation by entering or attempting to enter, after the blockade has been established, or by coming out after time.

On the question of knowledge, there seems to be some divergence between the practice of the English and American Prize Courts on the one hand, and that of the French and Continental Prize Courts on the other hand.

The views of the English Courts on this subject are clearly expressed by Sir W. Scott in the case of the *Neptunus* (2 C. Rob. 110). In that case a neutral vessel had been captured by the British, whilst on a voyage from Dantzic to Havre, then under blockade ; the blockade had been previously notified to neutral Governments, but the master was ignorant of the fact ; it also appeared that the master of the "*Neptunus*" had been previously informed by an officer of Admiral Duncan's fleet that the port of Havre was not under blockade. In his judgment Sir W. Scott stated in effect that a distinction existed between a blockade *de facto* and a notified

(*q*) See Woolsey, p. 351.

(*r*) See Phillimore, III., 474.

blockade ; in the former case, no presumption arose as to the continuance of the blockade, and the ignorance of the party might be admitted as an excuse for sailing on a doubtful or provisional destination ; but in the case of a notified blockade, it was the duty of foreign Governments to communicate the fact of a blockade to their subjects ; he therefore held that a neutral master could never be permitted to aver as against such a notification or blockade that he was ignorant of it ; if he was really ignorant of it, this might be a ground for claiming compensation from his own Government, but it could be no plea in the Court of a belligerent ; in view, however, of the communication made to the master of the "Neptunus" by an officer of the English fleet, it was held that the vessel was not taken *in delicto*, and both ship and cargo were ordered to be restored. Thus it seems that Great Britain and the United States recognise two kinds of blockade, one *de facto*, without proclamation, and the other by proclamation, accompanied or followed by fact. In the former case no vessel incurs liability unless there has been express warning ; in other words, it will be incumbent on the belligerent to prove knowledge on the part of the neutral, unless the blockade *de facto* has existed for any length of time, in which case knowledge might be presumed from the notoriety. In the latter case a general notification of the impending blockade is given to neutral States, a reasonable time being allowed for this to take effect. If there has been time to receive this, the mere sailing with an intention to break blockade will be sufficient to warrant condemnation. The intention may be gathered from such overt acts as starting for a blockaded port after notice, the use of false papers or spoliation of papers, or a change of course undertaken in order to avoid search.

According to the rule recently acted upon by France, whether the blockade be by notification or *de facto* only, there must be a special warning to a ship about to enter indorsed on the ship's papers (*s*).

With regard to cessation, in the case of a blockade *de facto* the blockade ceases when the fact ceases ; but where the blockade is accompanied by notification, *prima facie* the blockade is deemed to continue until it has been formally repealed. In the latter case it is the duty of the belligerent to notify the repeal immediately the blockade has ceased in fact ; to fail to do so and yet to enforce the obligations arising from blockade after it had been discontinued, would be to commit a fraud on the neutral.

The other aspects of the Law of Blockade will be gathered from the cases immediately following, whilst the cases cited under the doctrine of Continuous Voyages, will indicate how greatly the liability of neutrals in this department has been extended in modern times.

(*s*) See Wheaton, by Boyd, p. 674, and Barboux, 1870—1871, Appendix.

THE "HENRICK AND MARIA."

Temp. 1799.

[1 C. ROB. 146.]

Case.] During war between Great Britain and Holland, the "Henrick and Maria," a Danish ship, was captured and brought in on a charge of violating the blockade of Amsterdam. The master was warned "not to proceed to any Dutch port," Amsterdam being, however, the only Dutch port blockaded.

Judgment.] It was held that the notice was illegal, and that the ship was therefore not liable to condemnation; the rule being that if a belligerent has proclaimed a blockade of several ports, when he has only blockaded one, a neutral is at liberty to disregard the notice, and is not liable to the penalties of breach of blockade, for attempting to enter the port really blockaded.

The Henrick and Maria, 1 C. Rob. 146.

What is known as a paper or cabinet blockade, consists in a declaration of intention to blockade a place or a tract of coast, without stationing a force adequate to support the blockade. Such a declaration is ineffectual, and cannot by the Law of Nations affect a neutral with liability. Much less is a mere private notification effectual, where the place prohibited is not, in fact, blockaded.

The principle indicated is part of a larger principle, that blockade to be binding must be effectual. Thus in the case of the *Nancy* (1 Acton, p. 58), Sir W. Grant laid down in regard to the blockade of Martinique, that it was the duty of a blockading Power to maintain such a force as would be of itself sufficient to give effect to the blockade; this could only be carried out by keeping a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island; the periodical appearance of a vessel of war in the offing could not be supposed to be a continuation of the blockade.

By the Declaration of Paris, 1856, it was provided that "blockades in order to be binding must be effectual," that is to say, maintained by a force sufficient in reality to prevent access to the coast of the enemy. This provision, however, does not seem to do more than formulate an existing principle, and can scarcely be said to afford

any practical test of the sufficiency of a blockade (*t*). In 1884, on the occasion of the declaration by Admiral Courbet of a blockade of all ports and roadsteads between certain points of the Island of Formosa, the English Government protested against this measure as being a violation of the terms of the Declaration of Paris, 1856 (*u*).

THE "COLUMBIA."

Temp. 1799.

[1 C. Rob. 154.]

Case.] The master of an American ship was instructed by the owners to go north about as far as Cuxhaven and thence to Hamburg, where he was to put himself under the directions of Messrs. Boué & Company. Having arrived at Hamburg, Messrs. Boué directed him to proceed to Amsterdam, if the winds should be such as to keep the English fleet at a distance. Both the master and the consignees knew at the time of the ship's sailing for that port, that it was blockaded.

Judgment.] It was held that the mere sailing with an intention of evading the blockade, in the event of this being possible through the absence of the blockading squadron caused by adverse weather, constituted a breach of the blockade; and that the act of the master affected the owner of the vessel to the extent of the whole of the latter's property concerned in the transaction.

The Columbia, 1 C. Rob. 154.

A blockade is not suspended by the occasional absence of the blockading squadron caused by adverse weather, provided that the station is resumed with due diligence. The law considers an attempt to take advantage of such an accidental removal as an attempt to break the blockade and as a ground of confiscation. But this will not apply where the blockading squadron is driven off by superior force (*v*).

According to the doctrine of the English Prize Courts, in the case

(*t*) See Wheaton, by Boyd, p. 596.

(*v*) See the *Hoffnung*, 6 C. Rob. 116.

(*u*) See p. 150, *supra*.

of a blockade by notification, mere intent to break blockade is sufficient to constitute a breach and to warrant condemnation. To sail for a blockaded port, knowing it to be blockaded, will suffice to involve a vessel in guilt. The doctrine of the American Courts appears to be the same (*vv*).

An intention to break blockade may also be inferred from other circumstances, such as a suspicious change of course in order to avoid a man-of-war, an unnecessary deviation from the course warranted by the vessel's alleged destination, a refusal to lie to when notified to do so, or a use of false papers. Nor will a vessel be allowed to approach the blockaded port in such manner as would enable her, if opportunity offered, to slip in, under pretext of discovering whether the blockade still exists. In the case of distant voyages, however, and especially in the case of a blockade *de facto*, a wish to make the port, if permissible, conjoined with the calling at another port for enquiry, would not involve the vessel in liability whilst on her voyage to such port of enquiry. But, at the present time, the application of this rule in practice would probably be considerably narrowed, owing to the facilities that exist for communication by cable.

THE "FREDERICK MOLKE."

Temp. 1798.

[TUDOR'S LEADING CASES, 1011; 1 C. ROB. 86.]

Case.] In 1798, during war between Great Britain and France, the "Frederick Molke," a Danish vessel, broke through the blockade established by the English at Havre, and delivered her cargo. She then took on board a fresh cargo, and was, when attempting to leave the port, captured for breach of blockade, and subsequently brought in for adjudication. The ship and cargo, being the property of the same person, were both condemned.

Judgment.] Sir William Scott laid down in his judgment, that the act of egress was as culpable as that of ingress; a ship coming out of a blockaded port was in the first instance liable to seizure, and in order to obtain her release very satisfactory proof of innocence must be given.

The Frederick Molke, Tudor's Leading Cases, 1011;
1 C. Rob. 86.

(*vv*) See the *Nereide*, 9 Cranch, p. 440.

Breach of blockade may be committed by egress as well as by ingress. With regard to neutral ships already in the blockaded port, it is usual for the blockading Power to allow a limited number of days within which vessels may quit. Fifteen days may be considered as the shortest period adopted in practice. On the blockade of Buenos Ayres, in 1838, France allowed neutral ships forty-two days to come out. Ships in ballast or with cargo *bond fide* laden before blockade, are even allowed to come out at any time. But it is not lawful for a neutral ship to enter a blockaded port in ballast: if she enters at all it will be presumed that she did so fraudulently and with intent to violate belligerent rights.

The penalty for breach in every case will continue till the end of the return voyage, unless the blockade has meanwhile been discontinued. Thus in the case of the *Welvaart van Pillaw* (2 C. Rob. 128), a Prussian ship was taken in April, 1799, off Dungeness, and proceeded against for a breach of the blockade of Amsterdam, having sailed from thence with a cargo in March; it was urged on the claimant's behalf, that the capture was not made by any blockading force, nor near the mouth of the port; Sir William Scott stated that if the principle was sound, that a neutral vessel was not at liberty to come out of a blockaded port with a cargo, he knew no other natural termination of the offence but the end of the voyage, and he would hold that, if a ship that had broken a blockade was taken in any part of that voyage, she was taken *in delicto* and was subject to confiscation.

THE "GERASIMO."

Temp. 1857.

[11 MOORE, P. C. C. 88.]

Case.] During the Crimean War, a ship, under Wallachian colours, with a cargo of corn belonging to owners residing at Galatz in Moldavia, was seized when coming out of the Sulina mouth of the Danube, for breach of the Black Sea blockade. When the shipment was made, the Russians held possession of Moldavia and Wallachia, but such holding was with the expressed intention of not changing the national character or incorporating the country with Russia.

Judgment.] It was held, first, that the claimant could not, in the particular circumstances of the case, be considered an

alien enemy, the national character of the place not being changed by its being temporarily in the possession of a hostile force. Further, on the question as to liability for breach of blockade, it was held that, as the object of the blockade was to prevent the import of provisions, the fact of a neutral ship bringing out a cargo of corn, would not, under the circumstances, constitute a breach of the blockade.

The Gerasimo, 11 Moo. P. C. C. 88.

The deduction from this case is that where the declared purpose of the belligerent in instituting the blockade is to prevent the import of any particular class of commodities into a place occupied by the enemy, it will not be a breach of such blockade for a neutral to export such commodities.

NORTHCOTE v. DOUGLAS, THE "FRANCISKA."

Temp. 1855.

[10 MOORE, P. C. C. 37.]

Case.] In May, 1854, the Danish schooner "Franciska" was seized by one of Her Majesty's ships near the entrance of the Gulf of Riga, and sent home for adjudication, on the ground of having attempted to break the blockade of the Russian ports. It appeared that a blockade had been actually established, but that the English Government had given the Russians permission to export goods from blockaded Russian ports in the Baltic and the White Sea, and that a similar permission had been given by the French Government.

Judgment.] It was held that, as this permission had relaxed the blockade in favour of the belligerents, to the exclusion of neutrals, the blockade could not be enforced against the latter; and both on this and other grounds restitution was decreed, the sentence of the Court below condemning the vessel being reversed.

Northcote v. Douglas, The Franciska, 10 Moore, P. C. C. 37.

The principle of this decision is, that blockade must be established generally against all vessels, otherwise it will not be deemed effectual. A relaxation, therefore, of the blockade in favour of belligerents to the exclusion of neutrals, or, indeed, any general relaxation of the blockade, will have the effect of vitiating it. But a blockade will not be vitiated by particular licences granted to individuals (x).

THE "OCEAN."

Temp. 1801.

[3 C. Rob. 297.]

Case.] During war between Great Britain and Holland, the "Ocean" was brought in for adjudication, on the ground of having violated the blockade of Amsterdam. It appeared that the cargo of the "Ocean" had been ordered for shipment from Amsterdam to America, subsequently to the date of the blockade of that place, but previously to the blockade of the other ports of Holland. Under these circumstances, the goods had been sent overland from Amsterdam to Rotterdam, and thence shipped for America.

Judgment.] It was held that the internal communications of the country were in no way subject to the operation of the blockade, and restoration was decreed.

The Ocean, 3 C. Rob. 297.

The deduction from this case is, that if a place be blockaded by sea, it is no violation of belligerent rights for a neutral to carry on commerce with it by means of inland communications.

(x) See the case of the *For*, Edwards, 320.

THE "MERCURIUS."*Temp. 1798.*

[1 C. Rob. 80.]

Case.] The "Mercurius" was captured in 1798 for an attempt to violate the blockade of Amsterdam, the master having previously been warned that the port was under blockade. The ship was the property of a merchant of Hamburg, but the cargo belonged to a citizen of the United States. The cargo had been shipped at a time when the blockade could not have been known to the owner.

Judgment.] Sir W. Scott, in giving judgment, laid down the principle that a blockade might exist without a public declaration, although a declaration unsupported by proof of actual blockade would not be sufficient. In the present case, the blockade had not been known at the time of shipment, but notice of the blockade and a prohibition against entry had been given to the master by an English officer who had boarded the vessel. The vessel must therefore be condemned on the ground that the master intended to proceed to Amsterdam in defiance of this prohibition.

The learned judge then proceeded to consider how far, under these circumstances, the guilt of the ship could be said to affect the cargo. On this subject he laid down that in order that the conduct of the master should affect the cargo, it would be necessary to prove either that the owners of the cargo were or might have been cognizant of the blockade at the time the cargo was shipped, or to show that the act of the master of the ship personally bound them. Neither of these matters having been shown in the present case, restoration of the cargo was in effect decreed, subject to liberty of further proof, if the captors desired it, as to the ownership of the cargo.

The Mercurius, 1 C. Rob. 80.

The penalty for breach of blockade is confiscation of the vessel. If the cargo belongs to the owners of the vessel, the same penalty

will also attach to the cargo. But if the owners are different, then, according to the doctrine laid down in the *Mercurius*, to warrant the condemnation of the cargo, there must be proof that the owners either knew or might have known of the blockade, at the time the cargo was shipped ; or else that they expressly constituted the master of the vessel their agent for the purpose of directing the destination of the cargo. The result of the decision in the *Mercurius*, therefore, goes to exempt the cargo, unless the owners have actually or impliedly sanctioned the attempted violation of the blockade by the vessel. Subsequent cases, however, appear to have extended this liability considerably, and to establish the rule that the cargo will be liable, where the blockade either was or might have been known at the time it was shipped. Thus in the case of the *Alexander* (4 C. Rob. 94), in 1801, Lord Stowell held that where a ship attempted to enter fraudulently, the Court would presume that she was doing this in the service of the cargo and with the knowledge and authority of the owner. In the case of the *Adonis* (5 C. Rob. 259), 1804, (which was confirmed on appeal), the same learned judge went a step further and held that such presumption would be irrebuttable. The same principle was also followed in the case of the *Exchange* (Edw. 42), 1808, and in the case of the *James Cook* (Edw. 261), in 1810. The question came again under consideration in the case of the *Panaghia Rhomba* (12 Moo. P. C. C. 168). That ship, during the Crimean War, took in a cargo of wheat consigned to the Piræus, or Syra, on the joint account of an Ionian merchant resident in Turkey and of a London firm ; she was subsequently captured for an attempt to violate the blockade of Odessa, and was condemned. The Court acting on the rule as extended by the later cases, held that the owners of the cargo could not protect their property from condemnation merely by showing their own innocence in the transaction ; it was laid down that where a blockade was known or might have been known at the time when the cargo was shipped, and the owners of the cargo might therefore by possibility be privy to an intention of violating the blockade, such privy would be assumed as an irresistible inference of law, and it would not be competent to them to rebut it by evidence (y) ; further, that in cases of blockade, for the purpose of affecting the cargo with liability, the master would be treated as the agent for the cargo as well as for the ship. This rule represents the present doctrine of the British Prize Courts on the subject. It may operate harshly in individual cases, but as Lord Stowell remarked, it is justified by the fact that in nearly all cases of blockade, the attempted violation is made for the benefit and with the privy of the owners of the cargo, and that

(y) As would have been the case under the earlier rule.

if they were at liberty to allege their innocence of the master's act, evidence would be adduced which the captors would have no means of disproving, and it would be impossible to make a blockade effectual.

CONTRABAND.

THE "NEPTUNUS."

Temp. 1800.

[3 C. ROB. 108.]

Case.] In 1798, during war between Great Britain and Holland, the "Neptunus" was captured whilst on a voyage from Cronstadt to Amsterdam, on the ground of carrying contraband, and brought home for adjudication. Her cargo consisted of a quantity of tallow, sail-cloth, and other articles. As to the tallow, the captors pressed for condemnation on the ground that it was to be considered as naval stores. The same contention was also put forward as to the sail-cloth.

Judgment.] The Court expressed the opinion that tallow could not fairly be regarded as naval stores whilst on a destination to Amsterdam, this being a mercantile as well as a naval port; but it was intimated that if it had been taken on a voyage to Brest, this being exclusively a naval port, there would have been little doubt as to its contraband character. The tallow was consequently restored. It was, however, held that sail-cloth was universally contraband even on a destination to a port of mere mercantile equipment, and condemnation of that found on board was decreed.

The Neptunus, 3 C. Rob. 108.

Contraband at first signified those articles the importation of which into a country was publicly prohibited. It now denotes those articles which a neutral cannot carry into the country of a belligerent

without incurring the risk of confiscation. What is contraband, has always been a matter of uncertainty, and the list of contraband articles has varied greatly.

In considering the question of contraband generally, it may be convenient to glance, first, at the views of one or two of the more important writers on International Law, by reason of the weight attributed to such opinion by European maritime States, such as France, Germany, and Italy; next to set forth a few illustrations as to the regulation of contraband by treaty, or declaration of the great maritime powers; next to review a few of the more important decisions on the subject given by English and American Prize Courts; and finally to ascertain British official usage on the subject, so far as this may be gathered from the instructions issued to the British Naval Forces (2).

With regard to the views of the publicists, Grotius classes commodities under three heads; first, those useful for war only, which are always contraband; secondly, those useful for peace only, which are never contraband; and thirdly, those *incipitibus usus*, which are useful both in peace and war. Whether the last are contraband or not will depend on circumstances (a). Ortolan, a modern writer of great repute on all matters pertaining to naval warfare, lays down that arms and instruments of war are the only objects necessarily contraband; that raw material and merchandise fitted for peaceful as well as warlike use ought only to be treated as contraband under special circumstances; and that provisions and other objects of first necessity should never be treated as contraband (b).

Contraband has sometimes been defined by declaration of the Great Maritime Powers. Thus, by the declaration of the northern Powers, who were parties to the First Armed Neutrality of 1780, contraband was limited to munitions of war and sulphur. But this can scarcely be regarded as a satisfactory exposition of International Law, as the doctrine was altogether repudiated by Great Britain. At a later period, too, some of the parties to the Convention added considerably to the list of contraband articles. In 1798, on the outbreak of war between Great Britain and France, the National Convention of France declared provisions liable to pre-emption. Denmark in the same year issued a proclamation declaring horses, and articles necessary for the construction and repair of vessels, with the exception of unwrought iron, beams, boards and planks of deal and fir, to be contraband. By the declaration of the Second Armed Neutrality,

(a) This may be presumed to accord, and does in the main accord, with the principles laid down by judicial authority.

(a) See Grotius, Lib. VI. c. 1. § 5.

(b) See Ortolan, Vol. II., pp. 190 and 191.

1800, contraband was limited to cannons, mortars, firearms, pistols, bombs, grenades, bullets, balls, muskets, fireballs, matches, powder, saltpetre, sulphur, cuirasses, pikes, swords, belts, cartridge-boxes, saddles and bridles; but from these articles there was excepted the quantity necessary for the defence of the vessel and her crew. This list, moreover, was not to interfere with the particular stipulations of any treaties previously made with any of the belligerents. This enumeration of contraband articles was subsequently acquiesced in by Great Britain, and confirmed by treaty. By the Treaty of 1794, between Great Britain and the United States, naval stores were included among contraband objects; it being further provided that if provisions and articles not generally contraband were seized, they should not be confiscated, but that the owner should be indemnified.

Passing now to judicial authority on the nature of contraband, one of the most comprehensive statements on this subject is to be found in the judgment of the Supreme Court of the United States in the case of the *Peterhoff* (5 Wall. 58). There the Court observed that the classification of contraband best supported by British and American decisions, might be said to divide all merchandize into three classes; of these, the first consisted of articles manufactured and primarily used for military purposes in time of war; the second, of articles which might be and were used for the purposes of peace or war, according to circumstances; and the third, of articles exclusively used for peaceful purposes; articles of the first class destined for a belligerent country or place occupied by the belligerent, were always contraband; articles of the second class were contraband if actually destined to the military or naval use of the belligerent; articles of the third class were not contraband at all, though liable to condemnation for violation of blockade.

Munitions of war, such as firearms and explosives, are of course in their very nature contraband. In the view of the British Prize Courts, various other articles essential to naval warfare fall into the same category. Thus in the case of the *Maria* (1 C. Rob. 340), where a Swedish vessel had been captured by the British, whilst laden with a cargo of pitch, tar, hemp, deals, and iron, Sir W. Scott laid down that tar, pitch, and hemp going to the enemy were in their own nature liable to seizure (c). In the case of the *Charlotte* (5 C. Rob. 305), a Lubeck ship carrying a cargo of masts and spars, the property of a Russian merchant, was captured when on a voyage from Riga to Nantes, and brought in for adjudication; Sir W.

(c) For a modification of this doctrine as to pitch and tar, see the case of the *Sarah Christina*, p. 318, *infra*.

Scott stated in his judgment that masts would, unless protected by treaty, be considered as contraband, whether bound to a mercantile port only, or to a port of naval military equipment (*d*). In the case of the *Neptunus* it will be observed that this principle was extended to sail-cloth. But other articles used for naval equipment, such as timber, resin, and tallow, have commonly been treated as liable only if destined to a port of naval construction (*e*). So far as any general principle can be deduced from the English authorities, it would seem to be:—(1.) That some goods, such as arms and munitions of war, are liable to be condemned on mere inspection, as being in their nature contraband. (2.) That other articles, which are not essentially of a hostile character, must be made the subject of special enquiry, and are then liable to condemnation or entitled to immunity, according to circumstances. Amongst the circumstances on which liability will depend are the following: (*a*.) destination to a port of naval equipment or for the use of the enemy's military forces, (*b*.) the fact that the articles are or are not the produce of the country exporting them, and that they are or are not in an unmanufactured state, (*c*.) the position of the parties and general circumstances of the war. (3.) Finally, that in certain cases, especially in those where the goods captured are not of a kind usually treated as contraband, the practice of pre-emption will be adopted, this being sometimes also a matter of express treaty stipulation.

In the British Admiralty Manual of Prize Law (1888) it is stated to be part of the prerogative of the Crown in time of war, to extend or reduce the list of contraband articles. Subject to this, the following enumeration of contraband articles is given:—(1) As absolutely contraband—Arms of all kinds and machinery for manufacturing arms; ammunition and materials for ammunition, including lead, potash, nitrate of soda, gunpowder, saltpetre, brimstone and gun-cotton; military equipments and clothing; military stores; naval stores, including masts, spars, rudders, ship-timber, hemp, cordage, sail-cloth, pitch and tar, copper fit for sheathing, marine engines and all the component parts and materials used in the manufacture thereof; iron in any of the forms in which it is used for naval shipbuilding or repair. (2) As conditionally contraband—Provisions and liquors fit for consumption in army or navy; money; telegraphic materials, such as wire, porous caps, platinum, sulphuric acid and zinc; materials for railway construction; coals; hay; horses; resin, tallow and timber.

(*d*) See Tudor, *Leading Cases in Mercantile Law*, p. 988.

(*e*) The application of this doctrine to the case of provisions, and to coal,

will be gathered from the case of the *Jonge Margaretha* and appended note, p. 315, *infra*.

It should be observed that, as in blockade, there is nothing which requires a neutral state to prohibit its subjects from carrying contraband to either belligerent (*f*). Nor is there, apparently, any obligation on the part of the neutral State, to prohibit the sale within its territory of munitions of war by individuals to either belligerent, so long as the supply is not made to a belligerent warship in a neutral port, or for the purposes of an illegal expedition. Whether the munitions of war are sold to the belligerent within neutral territory, or exported by the neutral for sale to the belligerent territory, the other belligerent has, in either case, his opportunity of seizing such goods during their transit. In Great Britain, however, the Executive is armed with power, by Proclamation or Order in Council, to prohibit under pain of forfeiture, the export or carriage coastwise of arms, ammunition, gunpowder, military or naval stores, or any articles which may be deemed capable of being converted into military or naval stores. This extends even to provisions, or any sort of victuals which may be used as food for man. The question of coal is referred to later (*g*).

THE "JONGE MARGARETHA."

Temp. 1799.

[TUDOR'S LEADING CASES, 981; 1 C. ROB. 189.]

Case.] In 1797, during war between Great Britain and France, the "Jonge Margaretha," a Papenberg ship, was captured by the British, whilst carrying a cargo of Dutch cheeses from Amsterdam to Brest. There was at the time, in the port of Brest, a considerable French Fleet preparing for a hostile expedition against Great Britain. It appeared that the cheeses were exactly such as were used in British and also in French ships of war. Under these circumstances they were held to be contraband.

Judgment.] Sir W. Scott stated in his judgment, that the catalogue of contraband had varied very much owing to par-

(*f*) See *Seton v. Low*, p. 322, *infra*, and especially judgment of Lord Westbury in appended note.

(*g*) See appended note to *Jonge Margaretha*, p. 316.

ticular circumstances, the history of which had not accompanied the history of the decisions. In 1673, the King's Advocate declared corn, wine, and oil liable to be deemed contraband; in 1747, butter, salted cod, and salmon going to Rochelle were condemned, as were rice and salted herrings in 1748. The rule appeared to be that generally provisions were not contraband, but that they might become so under circumstances arising out of the particular situation of the war or the condition of the parties engaged in it. Amongst the circumstances tending to preserve provisions, one was that they were the growth of the country exporting them; another was the fact of their existing in their native unmanufactured state; but the most important distinction was whether or not they were going with a highly probable destination for military use.

The Jonge Margaretha, Tudor's Leading Cases, 981;
1 C. Rob. 189.

This decision was followed by the United States Courts in the case of the *Commercen* (1 Wheaton, 382). In this case, a Swedish vessel, with a cargo of barley and oats, was captured by a United States cruiser, during the war between the United States and Great Britain, whilst on a voyage from Limerick to Bilbao; it was held that as the provisions were exported from the enemy's country, and were destined for the use of the British forces in Spain (*h*), the voyage must be considered illegal, and, in addition to the confiscation of the cargo, loss of freight was decreed against the vessel. It was laid down, in judgment, that provisions were not usually contraband, but that they might become so if intended for the use of the enemy's army or navy, or destined for any port of naval equipment; further, that provisions which were at once the growth of the enemy country and destined for the use of its forces, were contraband, although bound for a neutral port.

Occasional contraband is a term applied by writers on International Law to those objects which are liable to be regarded as contraband

(*h*) This case is usually cited in connection with the subject of occasional contraband; but it seems to afford an equally good illustration of the liability

of goods carried by a neutral ship, under contract, to become the property of the enemy.

under some circumstances, but not under others. The justice of the doctrine has been denounced, on the ground that it is unfair to neutrals; that it gives the belligerent an option of declaring what he pleases to be contraband; and that if mitigated, as it frequently is by pre-emption, it resembles the infliction of a half punishment for an offence not wholly proven. Most English writers, however, uphold the doctrine.

In the French Revolutionary Wars of 1793 and 1794, the British authorities claimed that by the Law of Nations all provisions might be treated as contraband, whenever one of the means employed to reduce the enemy to reasonable terms of peace, was to deprive him of supplies. A question of a similar nature arose during the last war between France and China. On February 20th, 1885, the French Government announced, through its representatives abroad, that it proposed to treat rice bound for the open Chinese ports as contraband of war. On the 24th, it announced that it recognized the possibility of alleviating this measure, and would confine its prohibition to shipments of rice destined for the open ports north of Canton. M. Ferry, in his despatch on the subject, stated that the French Government had hitherto done everything it could to respect neutral interests, and had limited for months the area of hostilities; but that it had now received information that large quantities of rice were being forwarded to the northern ports of China, and that the stoppage of these would materially affect the Peking Government. He added that France could not afford to lose this opportunity, and that of the two alternative modes of effecting this end, one of which was to blockade Shanghai and the other open ports, and the second to declare rice contraband of war, he had chosen the latter as the least detrimental to the interests of neutrals. M. Ferry proceeded to urge that this course was justified both by precedent and analogy. The English Ambassador in China altogether refused to admit or allow the exercise of this right. Lord Granville, however, intervened and explained that the British Government would not resist the seizure of rice by physical force, and that its legality must be determined by the French Prize Courts, subject to ulterior diplomatic action. The subject was on several occasions mentioned in the House of Commons. The only official declaration that the British Government would commit itself to, was that it had made the requisite protest against rice being treated generally as contraband irrespective of its ulterior destination, and that the matter must be decided in the first instance by the French Prize Courts. On March 30th, however, the Ferry cabinet resigned, and on April 7th the preliminaries of peace were settled between the two countries. Apart from the question whether, in the face of the denial by the French Government that war really existed, the French cruisers were

entitled to exercise belligerent rights over neutral commerce, it is very doubtful whether the circumstances were such as brought the French declaration within the limits of the rules generally recognized as to contraband. Much less was it in accordance with the doctrines laid down on this subject by most Continental jurists.

The harshness of the rule making provisions, under certain circumstances, contraband, has been modified in practice by the doctrine of pre-emption. Sir William Scott, in the case of the *Haabet* (2 C. Rob. 179), gives an account of the origin of this doctrine, and of the rules governing it, according to the practice of the English Prize Courts. The learned judge there remarked that the seizure of cargoes of provisions had long been a right exercised by belligerent nations, the ancient practice of several maritime States of Europe having been to confiscate them entirely; in later times the more lenient practice had come to prevail of holding such cargoes subject to the right of pre-emption, that is, to a right of the belligerent captor to purchase, upon paying a reasonable compensation to the individual whose property was thus diverted; but no rule had established that such a practice should be regulated exactly upon the same terms of profit as would have followed the adventure if no such exercise of war had intervened; it was a reasonable indemnification and a fair profit, only, on the commodity, that was due, reference being had to the original price actually paid by the exporter and the expenses which he had incurred.

The decision in the case of the *Sarah Christina* (1 C. Rob. 237), discloses at once a modification of the ordinary liability of pitch and tar, and an affirmation of the doctrine of pre-emption in regard to such articles. In that case, Sir William Scott stated that although pitch and tar were in a maritime war usually from their very nature liable to condemnation, yet it was the practice of the Court to allow the carriage of these articles, where they were the produce of the claimant's country; this mitigation of the ordinary rule being, however, subject to a right of pre-emption on the part of the belligerent, and conditional on perfect *bona fides* on the part of the neutral.

According to the English practice when the right of pre-emption is exercised, the goods are paid for at their mercantile value, together with a reasonable profit, usually calculated at 10 per cent. (i).

The importance of coal in modern maritime warfare has on several occasions given rise to a discussion as to how far it is contraband, and as to how far it must be withheld from either belligerent. In 1859 and 1870 it was declared by France not to be contraband. According to Calvo the greater number of secondary States have

(i) Naval Prize Act, 1864, 27 & 28 Vict. c. 25, sect. 38.

expressed themselves in a similar manner with reference to this. In 1870, during the Franco-Prussian War, Great Britain held that the character of coal depended upon its destination, and refused to permit vessels to sail with it to the French fleet in the North Sea. Germany remonstrated against Great Britain's allowing its export under any circumstances. According to Mr. Hall (*k*), the view adopted by the English authorities, on the subject, was correct. Coal being used for so many innocent purposes of daily life, the mere fact of its being sent to a belligerent port ought not to be held sufficient to condemn it; if, on the other hand, its destination were to a port of naval equipment, or if for some other reason it appeared probable that there was an intention to devote it to hostile use, it would under these circumstances become liable to condemnation. But even in the latter case, it does not seem that the neutral State would be under any obligation to prohibit the export of coal on the mere ground of its being contraband, although the power to do so may, occasionally, be given by municipal law (*kk*).

THE "MARGARET."

Temp. 1810.

[1 ACTON, 333.]

Case.] The "Margaret," an American vessel, sailed in 1804, during war between Great Britain and France, from Baltimore, with a cargo of tar and gunpowder, for the Cape of Good Hope (*l*). On her arrival at the Cape she disposed of part of her cargo, and then proceeded to the Isle of France (*m*), where the remainder was disposed of. Thence she proceeded to Batavia in ballast, and, after several intermediate voyages, finally sailed with a cargo of sugar, coffee, pepper, and other goods for Baltimore. In the course of this voyage she was captured by a British cruiser and brought in for adjudication. Both on the outward and homeward voyages false papers appear to have been used.

(*k*) See Hall, p. 664.

(*kk*) See p. 315, *supra*.

(*l*) The Cape was at this time in the occupation of the Dutch; it did not

pass permanently into the possession of the British till 1806.

(*m*) Now Mauritius.

Judgment.] On the case coming before the Prize Court, both ship and cargo were condemned. On appeal, the decree of condemnation was affirmed. Sir William Grant stated in his judgment that if, in such circumstances as the present, a vessel carried contraband on the outward voyage, she was liable to condemnation on the homeward voyage, it being by no means necessary that the cargo should have been purchased with the proceeds of the contraband.

The Margaret, 1 Acton, 333.

In this case the Court had to deal with the circumstances under which the carriage of an outwardbound contraband cargo would involve the vessel and an innocent cargo on the homeward voyage; it was held that where the circumstances were such as to affect the ship with liability in respect of the outward voyage, this liability would continue to attach to her till the end of the return voyage.

Some writers contend that a ship engaged in carrying contraband is entitled to proceed on her voyage after delivering over to the belligerent all contraband on board, unless it is too extensive in quantity to permit of this being done; and in numerous instances treaties to this effect have been entered into. The more usual practice is to bring both ship and cargo before the prize courts of the captor's country.

The ship is *prima facie* entitled to release subject to the penalty of loss of time, freight and expenses. Carriage of contraband will, however, affect the ship and render her liable to confiscation where both the ship and the contraband belong to the same individual; or where the owner of the ship has been privy to the carriage of the contraband; or where, as in the case of the *Margaret*, false papers have been used. Confiscation of the ship has also sometimes been decreed where the contraband comprises three-fourths of the cargo, or where the articles are contraband under a treaty to which the ship's country is a party.

With regard to cargo not contraband, this is usually released unless it is the property of the owner of the contraband.

The liability to confiscation attaches from the moment of the ship's leaving port on a hostile destination and extends to the termination of the return voyage where false papers had been used.

THE "IMINA."

Temp. 1800.

[3 C. ROB. 167.]

Case.] In 1798, during war between Great Britain and Holland, the "Imina" sailed on a voyage from Dantzic to Amsterdam, with a cargo of ships' timber, but in consequence of having received information of the blockade of Amsterdam, she changed her course and was proceeding to Embden, a neutral port, when she was captured by a British vessel and brought in for adjudication.

Judgment.] Sir William Scott, in giving judgment, held that contraband, in order to be confiscable, must be taken in the actual prosecution of a voyage to an enemy's port; from the moment of quitting port on a hostile destination the offence was complete, and it was not necessary to wait till the goods were actually endeavouring to enter the enemy's port; but if, on the other hand, the goods were not taken *in delicto*, or in the actual prosecution of such a voyage, the penalty was not generally held to attach. In the present case, the voyage having been to a neutral port, restitution was decreed.

The Imina, 3 C. Rob. 167.

The principle deducible from this case is that contraband is usually subject to confiscation, only when taken on a voyage to an enemy port. Under ordinary circumstances, goods bound for a neutral port cannot be deemed contraband. To this general rule, however, there are certain exceptions. In the case of the *Commercen* (mm), it was held that provisions consigned to a neutral port, but destined for the use of the British forces in Spain, were of so contraband a character as not only to involve confiscation of the goods, but also to subject the neutral vessel to loss of freight (n). Moreover, under the doctrine of Continuous Voyages, as applied to contraband, the United States Courts have held that property of a contraband nature is liable to condemnation if there be a presumption of an ulterior hostile destination, even though the immediate destination be to a port in neutral territory (o).

(mm) See p. 316, *supra*.

(n) But see p. 336, *in notis*.

(o) See the case of the *Peterhoff*, p. 338, *infra*.

SETON v. LOW.*Temp.* 1799.

[1 JOHNSON (N.Y.) CAS. 1.]

Case.] A policy of insurance was effected by the plaintiffs with the defendants on "all kinds of lawful goods and merchandises" on board the "Hannah," bound on a voyage from New York to Havannah. The defendants were not informed of the nature of the cargo. The ship was captured, and part of the cargo condemned as contraband. The cargo was abandoned in favour of the defendants, and an action was then brought on the policy. It was contended on behalf of the defendants that the contraband goods were not "lawful" within the meaning of the policy, and that the assured should have disclosed the fact that part of the cargo was contraband.

Judgment.] Kent, J., held the goods to be lawful, laying down in judgment that, though the Law of Nations authorized the seizure of contraband articles by belligerent powers, yet a trade by a neutral in articles of contraband was a lawful one, although from necessity subject to the risk of capture and loss. The other point was also decided in favour of the plaintiffs, for whom judgment was accordingly given.

Seton v. Low, 1 Johns. (N. Y.) Cas. 1.

It is in one sense perfectly lawful for a neutral to carry contraband to a belligerent port, or to endeavour to evade a blockade ; although, in either case, the venture will subject the ship or cargo, or sometimes both, to the risk of capture and confiscation by the other belligerent. The rights of neutrals and belligerents in these cases are co-existing rights ; neither can charge the other with a criminal offence. In the case of *Ex parte Chavasse, In re Grazebrook* (84 L. J. N. S. Bank. 17), it appeared that Grazebrook, a merchant carrying on business at Liverpool, had arranged in 1862 with one Chavasse, for the purchase on their joint account of a large quantity of arms and ammunition to be consigned to a third party, resident in the Confederate States of North America, and sold on their joint account. In 1864 an application was made by the trustees of a deed of assignment executed by Chavasse for

the benefit of his creditors, for an apportionment of the proceeds of this venture. The application was resisted on the ground that the contract was for the importation of contraband goods into the Confederate States, and therefore illegal. The judgment of Lord Westbury contains the following important statement : "In the view of International Law, the commerce of nations is perfectly free and unrestricted. The subjects of each nation have a right to interchange the products of labour with the inhabitants of every other country. If hostilities occur between two nations, and they become belligerent, neither belligerent has a right to impose, or to require a neutral government to impose, any restrictions on the commerce of its subjects. The right which the law of war gives to a belligerent, does not produce the consequence that the act of a neutral, in transporting munitions of war to a belligerent country, is either a personal offence against the belligerent captor, or an act which gives him any ground of complaint either against the neutral trader personally or against the Government of which he is a subject. The act of the neutral trader in transporting munitions to the belligerent country is quite lawful, and the act of the other belligerent in seizing and appropriating the contraband is equally lawful. All that International Law does is to subject the neutral merchant to the risk of having his ship and cargo captured and condemned by the belligerent Power for whose enemy the contraband is destined." His lordship accordingly held that the contract was a lawful one, and that the ordinary rights of property resulted from it ; and the decree of the Court below, dismissing the application, was reversed.

Similar principles have been applied to contracts involving an intended breach of blockade. In the case of the *Helen* (L. R. 1 A. & E. 1), the master of a ship sued for wages under an agreement entered into between himself and the owners. An article of the defendant's answer, alleging that the agreement was entered into for the purpose of running the blockade of the southern ports of the United States of America, or one of them, and was therefore contrary to law, was ordered to be struck out. Dr. Lushington stated in his judgment, that principle, authority and usage called upon him to reject the new doctrine, that to carry on trade with a blockaded port was, or ought to be, a municipal offence.

It is doubtful, however, whether the decision in the case of *Ex parte Chavasse*, would apply to contracts for the carriage of property in violation of the Rule of the War of 1756 (oo).

(oo) See p. 330, *infra*.

ANALOGUES OF CONTRABAND.

THE "OROZEMBO."*Temp. 1807.*

[6 C. ROB. 430.]

Case.] During the war which prevailed between Great Britain and Holland at the beginning of the present century, an American ship was chartered by a merchant at Lisbon, ostensibly to proceed in ballast to Macao and thence to take a cargo to America. Afterwards, by direction of the charterer, three military officers of distinction and two persons employed in civil departments in the Government of Batavia, were received on board. There were other persons on the ship, making seventeen in all. The vessel was captured by a British cruiser, and application made for its condemnation. It was contended on behalf of the owners of the vessel, that in order to support the penalty of condemnation, some proof of delinquency in the master or the owner should be given.

Judgment.] Sir William Scott, in giving judgment, held that the fact of there being even three military officers on board, was sufficient to involve the vessel in guilt. With regard to the civil officers, the learned Judge remarked that he did not feel called upon to determine whether the same principle applied to them; but he added that it appeared to him only reasonable that, "wherever it was of sufficient importance to the enemy that such persons should be sent out on the public service at the public expense, it should afford equal ground of forfeiture against the vessel engaged in carrying them." As to the contention that to warrant condemnation there should be some proof of delinquency on the part of the master or owner, the learned Judge held that such

proof was not necessary, and that it was sufficient if any injury arose to the belligerent from the employment in which the vessel was found to be engaged.

The Orozembo, 6 C. Rob. 430.

The doctrine of contraband has been extended by analogy to the carriage by a neutral of (1) naval and military persons, (2) official despatches, whilst (3), in the case of the *Trent*, it was sought to extend it to the carriage of enemy's envoys.

From the above case it appears that the carriage of naval or military officers belonging to one belligerent will involve the neutral in liability towards the other, even though he does not know of the service in which he is engaged, or even though he may have been impressed into the service against his will. In the latter case the neutral must look to his own Government to procure him redress against the belligerent by whom he has been coerced.

THE "ATALANTA."

Temp. 1808.

[6 C. Rob. 440.]

Case.] In 1807, during war between this country and France, a neutral ship was captured on a voyage from Batavia to Bremen. A tea-chest in a trunk belonging to one of the supercargos was found to contain despatches from the Governor of the Isle of France to the French authorities.

Judgment.] In view of this fact, the vessel and all cargo belonging to the owners and to the supercargo, were condemned, the Court laying down in its judgment, that the carriage of despatches between the colonies and the mother country of the enemy was a service highly injurious to the other belligerent, and an act of the most noxious and hostile kind.

The Atalanta, 6 C. Rob. 440.

Liability for transmission of despatches, however, seems to differ from the liability arising from the carriage of military persons, inasmuch as, in the former case, the neutral vessel is only liable if the neutral master or owner knew that the despatches were connected with belligerent objects. In the case of the *Rapid* (Edwards, 228), an American ship was captured, during the war between England and Holland, on a voyage from New York to Tonningen. Among the papers given up by the master at the time of capture was a despatch addressed to the Dutch Colonial Minister at The Hague, under cover of a communication to a commercial house at Tonningen. On this ground an order for the confiscation of the ship was applied for. It appeared that the master of the ship, who was an American, had received the despatch among other letters from private persons, and was ignorant of its contents. Under these circumstances an order for confiscation was refused.

THE "MADISON."

Temp. 1810.

[EDWARDS, 224.]

Case.] During war between Great Britain on the one side and France and Denmark on the other, the "Madison," an American ship, was captured by a French privateer and carried into Dieppe, but subsequently liberated. After her liberation she was proceeding in ballast to Baltimore, when she was again captured, this time by a British cruiser. The compulsion under which she went into Dieppe, which was then blockaded, being sufficient to exempt her from the penalties of a breach of the blockade, the captors pressed for her condemnation on the ground that there was on board a despatch from the Danish Government to the Danish Consul-General at Philadelphia.

Judgment.] Sir William Scott in his judgment held that a communication from the Danish Government to its own consul in America did not necessarily imply anything that was of a nature hostile or injurious to British interests, and it was not

to be so presumed. If such communications were interdicted the functions of such official persons would cease altogether. Restoration of the ship was accordingly decreed.

The Madison, Edwards, 224.

The carriage of despatches from a belligerent government to its diplomatic or consular agents in a neutral country is not an act of a hostile nature in regard to the other belligerent. One belligerent is not entitled to cut off communication between the neutral and the other belligerent. The neutral has a right to preserve his relations with the enemy, and it is not to be presumed that communications between them are fraught with hostility towards the other belligerent. The carriage of mail-bags is also exempted under special treaties (oo).

THE "TRENT."

Temp. 1862.

[PARLIAMENTARY PAPERS, 1862, VOL. LXII.]

Case.] The "Trent" was a British merchant steamer. In November, 1861, she was on a voyage from Havannah to St. Thomas, with mails and passengers. Amongst the passengers were Messrs. Mason and Slidell, envoys from the Confederate States to Great Britain and France. When about nine miles from the coast of Cuba, she was stopped by the United States cruiser, the "San Jacinto." Lieutenant Fairfax, an officer of the "San Jacinto," then put off in a boat and boarded the "Trent." He demanded the surrender of Messrs. Mason and Slidell and their secretaries. After some parley, and in spite of the protest of the captain of the "Trent," Messrs. Mason and Slidell, with their secretaries, were transferred to the "San Jacinto," and were subsequently imprisoned in a military fortress. Just so much force was used as

(oo) See p. 158, *supra*.

was necessary to satisfy the parties concerned that resistance would be unavailing. The "Trent" was then allowed to proceed on her voyage. When these facts became known, the British Government demanded the restoration of the persons and an apology. In this demand Great Britain was supported by France, Austria, Prussia, Italy, and Russia.

In consequence of the firm attitude of Great Britain, the United States Government was compelled to release Messrs. Mason and Slidell; but their release was accompanied by a long state-paper in which Mr. Seward contended:—(1.) That Messrs. Mason and Slidell, and their despatches, were liable to be regarded as contraband. In support of this contention, Mr. Seward relied on the following arguments:—That contraband in its original signification meant contrary to proclamation, prohibited; that naval and military persons came within this definition; that Vattel had laid down the principle, "War allows us to cut off from an enemy all his resources, and to hinder him from sending ministers to solicit assistance;" that Sir William Scott, in the case of the *Caroline* (6 C. Rob. 468), had laid down that "You may stop the ambassador of your enemy on his passage;" that the same learned Judge, in the case of the *Orozembo*, had held, that, when it was of importance to an enemy that ministers should be sent out on the public service at the public expense, the fact of carrying them afforded a ground of forfeiture against the vessel let out for a purpose so intimately connected with hostile operations. (2.) That Captain Wilkes had, therefore, a right to detain and search the "Trent," and the fact that the ship was proceeding from one neutral port to another was immaterial. (3.) That the right of search was exercised in a lawful and proper manner. (4.) That having found the contraband on board, he had a right to capture it. Mr. Seward did not, however, attempt to justify the mode in which the right had been exercised, and expressed an opinion that the ship should have been brought into a United States port for adjudication.

To this despatch the British Government replied, pointing out that neutral States had a perfect right to maintain friendly relations with both belligerents. The only distinction, arising out of the peculiar circumstances of a civil war, was that, in order to avoid the question of the recognition of the independence of one of the belligerents, diplomatic agents were frequently substituted for ministers proper, with the powers and immunities of ministers, though not invested with representative character or entitled to diplomatic honours. Messrs. Mason and Slidell must have been sent in that character and would have been received, if at all, in that character. The conveyance of those gentlemen and their despatches was, therefore, no breach of neutrality. Neither could they be regarded as contraband. The dictum of Sir W. Scott in the case of the *Caroline*, had no reference to the case of an ambassador from a belligerent to a neutral State, when found on board a neutral ship. The case of the *Orozembo* was distinct from the present case, inasmuch as the former vessel was found to have been engaged as an enemy transport. The duties of Messrs. Mason and Slidell were not in any way connected with military operations. It was also contended that no authority could be found giving countenance to the proposition that persons or despatches, when in a neutral vessel on a voyage to a neutral port, could ever be seized as contraband of war (p).

The Trent, Parliamentary Papers, 1882, Vol. LXII., p. 607.

The two weak points in the American case, as stated by Mr. Seward, seem to be (1) the ignoring of the fact that Messrs. Mason and Slidell were bound to a neutral port, and (2) the ignoring of the right which every neutral has of maintaining communication with an acknowledged belligerent. It was the want of hostile destination, except

(p) For a careful criticism of the argument in support of the United States' contention, the reader is re-

ferred to *Historicus*, pp. 187—198; and Kent, pp. 357—363.

in the most strained construction of that term, which distinguished this case from the carriage of ordinary contraband, and from such cases as the *Orozembo* and the *Atalanta*. The contention that these envoys were public officers sent out at the public expense for the purpose of promoting hostile designs against the United States on the part of neutral governments, may be adequately met by the reply, that whilst a State remains neutral it has a right to discuss and consider any communications or propositions which may be made to it by any other State or recognized belligerent body. It will be observed, also, that Mr. Seward fully admitted that the method in which the right had been exercised was improper, although he attempted to condone the irregularity on the ground that it was adopted in the interest of and as a matter of grace to the neutral vessel.

RULE OF THE WAR OF 1756.

THE "IMMANUEL."

Temp. 1799.

[TUDOR'S LEADING CASES, 948 ; 2 C. ROB. 186.]

Case.] In 1799, during war between Great Britain and France, the "Immanuel," a Hamburg ship, was captured by the English whilst on a voyage from Hamburg to St. Domingo, having on her voyage touched at Bordeaux, where she sold part of the goods brought from Hamburg and took other goods for St. Domingo. Condemnation of ship and cargo was sought by the captors on the ground that the vessel was in fact engaged in a trade between the enemy country and one of its colonies. Several questions were raised in the course of the case, one being as to whether the English had not themselves traded with St. Domingo ; another, as to whether, assuming certain contraband goods to have been discharged at Bordeaux, it would infect the subsequent carriage of other goods. The principal question, however, was whether neutral property engaged in a direct traffic between the enemy and his colonies was to be considered as liable to confiscation.

Judgment.] Sir William Scott laid down in his judgment, that on the breaking out of a war, it was the right of neutrals to carry on their accustomed trade with the exception of trade to blockaded places or in contraband articles, and subject to their ships being liable to visitation and search. But it was a very different thing for the neutral to engage in a trade which he had never previously enjoyed, which he held by no title of use and habit in time of peace, and which in fact he could obtain in war by no other title than by the success of the one belligerent against the other, and at the expense of that very belligerent under whose success he set up his title. The learned Judge expressed his opinion that the colonial trade, generally speaking, was of such a character as he had described. The colonial trade was one generally confined to the exclusive use of the mother country to which the colony belonged. It could not be considered to be a right of neutrals to intrude into a commerce which had been uniformly shut against them, and which was forced open merely by the pressure of war ; for when the enemy, under an entire inability to supply his colonies and to export their products, affected to open them to neutrals, it was not his will but his necessity that changed his system ; that change was the direct and unavoidable consequence of the compulsion of war. In the present case it was a measure, not of French councils, but of British force. In view of these considerations the goods shipped at Bordeaux were condemned, the Judge intimating that, until he was better instructed by the judgment of a superior tribunal, he would continue to hold that he was not authorized to restore goods, although neutral property, passing in direct voyages between the mother country of the enemy and its colonies. As to the ship, it belonged to the same proprietors as the cargo, and if the goods had been contraband the ship would have been liable to confiscation, but inasmuch as it was a case where a neutral might more easily misapprehend the extent of his own rights, and as it was also a case of less simplicity, in which he acted without the notice afforded by former decisions on the subject,

restitution of the ship was decreed, but without freight or expenses. The goods shipped at Hamburg were also restored.

The Immanuel, Tudor's Leading Cases, 948 ; 2 C. Rob. 186.

This case was decided on what is now commonly called the Rule of the War of 1756. The rule is really older, but received its most explicit enunciation about that time. Its purport is that where a colonial or coasting trade is prohibited to other nations in time of peace, but thrown open in time of war, a neutral by engaging in this trade, renders himself liable to the other belligerent. This liability, which usually extends both to ship and cargo, rests on two grounds :—(1) That the opening up of such a trade by one belligerent must be presumed to be due to pressure of the war and the neutral by engaging in it interferes in the war to the prejudice of the other belligerent ; (2) That the neutral, by engaging in a trade hitherto confined to subjects, virtually incorporates himself in the mercantile marine of the enemy.

In the war referred to, the French fleet had been driven from the seas by the English. The French were thus unable to maintain communication with their colonies. In this emergency, they invited the Dutch to carry on their colonial trade for them, though this was at other times confined to French subjects. The English Courts, however, applying the principle above referred to, subjected Dutch vessels engaged in this trade, to condemnation. The case of *Berens v. Rucker* (1 W. Black. 314), which was decided about 1758, contains a dictum of Lord Mansfield to the effect that if a neutral vessel traded to a French colony with all the privileges of a French vessel, it must be deemed to have been adopted and naturalized, and hence to be liable to capture as a French vessel.

The rule was revived in the war of 1793, and enforced during the long series of wars arising out of the French Revolution. It received a considerable extension, owing to the doctrine of Continuous Voyages referred to below. It can, however, scarcely be considered a settled rule of International Law ; its importance has also been much diminished by the fact that, amongst the principal maritime nations, the coasting and colonial trade have now been generally opened up to foreigners. It is, however, stated by Mr. Arnould, in his work on Marine Insurance, that "An insurance effected in this country, being at the time a belligerent power, to protect neutral trading of this exceptional character, would be treated as wholly illegal and void by our courts, on the ground that trading to an enemy's colony, with all the privileges of an enemy's ship, causes a neutral vessel to be

regarded as an enemy's ship, and renders her lawful prize (g)." But apparently this view is open to some doubt (r).

During the Crimean War the rule appears to have been superseded by an Order in Council of the 15th of April, 1854, whereby it was declared that "the subjects or citizens of any neutral or friendly State shall and may, during the present hostilities with Russia, freely trade with all ports and places wheresoever situate, which shall not be in a state of blockade."

THE DOCTRINE OF CONTINUOUS VOYAGES.

THE "WILLIAM."

Temp. 1806.

[5 C. ROB. 385.]

Case.] In 1800 during war between Great Britain and Spain, the "William," a neutral ship, sailed from La Guira, a Spanish colony, with a cargo of cocoa to Marblehead in the United States. On arriving at Marblehead the cargo was landed and entered at the custom house and a bond was given for the payment of duties. The ship was then again laden with the chief part of the former cargo and some sugar, and sailed a few days later for Bilboa in Spain. In the course of this voyage the vessel was captured by the British, and on being brought in for adjudication, it was held by the lower Court that such part of the cargo as had been shipped at La Guira was liable to condemnation.

Judgment.] This decree was confirmed by the Court of Appeal, where it was laid down that the mere touching at a neutral port, together with payment of dues there, was not sufficient to establish a *bond fide* importation into America, unless accompanied by an honest attempt to bring them into

(g) See Arnould, p. 714.

(r) See Tudor's Leading Cases in Mercantile Law, 972—980; also dictum.

of Lord Westbury in *Ex parte Chavasse*, 34 L. J. N. S. Bank. 17.

the common stock of the country, that the voyage in the present case was practically a continuous one from La Guira to Bilbao, and was therefore in violation of the Rule of the War of 1756.

The William, 5 C. Rob. 385.

This case illustrates the doctrine of Continuous Voyages as applied in connection with the Rule of the War of 1756. Neutrals sought to evade the latter rule by touching on their voyages from the colony to the mother country at a neutral port, and there landing cargo and paying dues. It was held by the English courts, however, that if there was an intent to carry goods from the colony to the mother country, in violation of the Rule of the War of 1756, the proceedings at a neutral port, being merely colourable, would not avail; and that in such case the voyage would be regarded as a continuous one artfully interrupted, and the penalty would take effect. In the case of the *Essex*, which was referred to by Sir W. Scott, in the case of the *Maria* (s) as the leading case on the subject, an American vessel had taken on board a cargo of Spanish produce at Barcelona, with instructions from the European agent, "that she should go to the Havannah, first touching at Salem, in America, where the owner resided;" this plan was subsequently acquiesced in by the owner. In spite of the fact that Salem was a neutral port, the Court held both ship and cargo liable to condemnation, on the ground that there was an original intention to proceed to Havannah, and that the voyage was in reality a continuous one from Spain to a Spanish colony.

Where the neutral, however, could prove a *bonâ fide* importation into the neutral country, then the subsequent voyage from the neutral port to the belligerent country was not regarded as involving the vessel in liability. In the case of the *Maria* (5 C. Rob. 365), an American ship was captured by a British cruiser during war, and brought in for adjudication on the ground of having engaged in the enemy's colonial trade. It appeared that the "*Maria*" had sailed from Havannah to New Providence with a cargo of colonial produce; at the latter port she was refitted, and after taking on board part of the same cargo, but with other goods belonging to the same owner, she sailed for Amsterdam; inasmuch as there was no evidence of original intention to carry from Havannah to Amsterdam, and as the cargo for Amsterdam was not entirely the same as that brought from Havannah to New Providence, Sir Win. Scott allowed the owner of the cargo to adduce proof of his original intention to sell them in

(s) See 5 C. Rob. 369.

America ; this having been done, it was held that the voyage was not a continuous one, and restitution was decreed. Some stress was laid upon the fact that, in this case, the voyage, though to an enemy port, was not to the mother country of the colony, as well as on the fact that part of the cargo only had been carried on. Sir W. Scott, whilst attributing due weight to those facts as indications of intention, yet intimated that he had no disposition to relax the general test of a *bonâ fide* intent to sell at the neutral port.

THE "STEPHEN HART."

Temp. 1863.

[BLATCHFORD'S PRIZE CASES, 387.]

Case.] During the American Civil War the "Stephen Hart," a British vessel, whilst on a voyage from London to Cardenas, a neutral port, with a cargo consisting wholly of contraband, was captured by a United States war vessel, and brought in for adjudication, on the ground that the cargo was intended to be delivered to the enemy either directly in the vessel itself, or by being transhipped at Cardenas, and thence carried on by another vessel.

Judgment.] Betts, J., in giving judgment, laid down that liability would not depend upon whether the ship was documented for and sailing upon a voyage from London to Cardenas, but upon the real destination and intended use of the cargo. The unlawful character of the carriage of contraband was not determined by deciding whether the immediate destination was to a port of the enemy, or not ; on the contrary, if contraband goods were ultimately destined for the direct use of the enemy's army or navy, the transportation would be illegal. The proper test was whether or not the goods were intended for sale or consumption in the neutral market. If the contraband cargo was destined, when it left England, for the use of the enemy, no principle of the Law of Nations, and no consideration of the rights of neutral commerce, could sanction the view that

the mere touching at a neutral port, either for the purpose of making it a new port of departure or for the purpose of transshipment, ought to exempt the vessel or cargo from capture. After reviewing the facts of the case, the learned Judge condemned both vessel and cargo as lawful prize.

The Stephen Hart, Blatchford's Prize Cases, 387.

The doctrine of Continuous Voyages was, during the American Civil War, applied by the United States Courts to the case of neutral vessels carrying contraband goods or seeking to break blockade. During this war many vessels sailed to Nassau, an English port in Providence Island, adjacent to the coast of the Southern States, or to some other neutral port near at hand. It was thus sought to secure immunity during the voyage from the port of shipment to such neutral port. On reaching the neutral port a new start was either made for the belligerent port, or else the cargo was unloaded with the view of being carried on by other vessels. The United States Courts, however, held that if there was an original intent that the goods should be carried to a hostile destination, whether by the same or other vessels, the penalty would take effect.

In the case of the *Bermuda* (3 Wall. 551), which was captured on a voyage to Nassau, whilst carrying a cargo of contraband, it was contended on behalf of the owners that a British merchant as a neutral had a perfect right to trade, even in military stores, between the ports of his own country, and had a right to sell at such a port goods of all sorts, even to an enemy of the United States, and with knowledge that they would be employed in war against the American Government. As to this the Court observed, that if by trade between neutral ports was meant real trade, in the course of which goods conveyed from one port to another, would become incorporated with the mass of goods offered for sale in such port, and if by sale was meant a sale to either of the belligerents as might chance to buy, then the contention was correct; but if it was intended to affirm that a neutral ship might take a contraband cargo ostensibly for a neutral port, but in reality destined to be delivered to one belligerent, either by the same ship or another, without becoming liable to seizure by the other belligerent from the very commencement of her voyage, then the Court could not agree to it; it made no difference whether the destination to the rebel port was ulterior or direct, nor could transshipment at Nassau break the continuity of the transportation; the interposition of a neutral port had always been a favourite resort

of contraband carriers and blockade-runners, but it never availed when the ultimate destination was ascertained; the transportation remained continuous as long as the intent remained unchanged, no matter what stoppages or transshipments intervened.

THE "SPRINGBOK."

Temp. 1863.

[BLATCHFORD'S PRIZE CASES, 434; 5 WALLACE, 1.]

Case.] During the American Civil War, the "Springbok," an English vessel, was on a voyage from London to Nassau, with a cargo of goods all belonging to one owner, some of them of a contraband character and others not, when she was captured by a United States cruiser, and brought in for adjudication. It appeared from the evidence, that, at the time of the departure from England, it was intended that the cargo should be transhipped at Nassau, and carried on by another vessel to the Confederate States, in violation of the blockade at that time established by the Federals.

Judgments.] The lower Court on this ground condemned both ship and cargo, contraband and non-contraband. On appeal the Superior Court confined the decree of condemnation to the cargo only, on the ground that there was not sufficient proof of knowledge on the part of the owners of the ship that the cargo was really destined to be carried on to a blockaded port.

The Springbok, Blatchford's Prize Cases, 434; 5 Wallace, 1.

This case is cited as illustrating the respective liability of ship and cargo under the doctrine of Continuous Voyages as applied to the breach of blockade and the carriage of contraband. The vessel herself was restored, on the ground that there was not sufficient proof that the owners were privy to the intention of ultimately delivering the cargo in violation of the blockade, this conclusion being supported by the fact that the cargo was to be carried on by another vessel. In the case of the *Bermuda* (3 Wall. 551), the Court observed that if the owners of the ship conveying the cargo were ignorant of the ulterior destination, and did not let their ship with

the view to it, the ship would not be liable ; but if the ulterior destination was the inducement to the earlier part of the voyage, then whatever liability might attach to the final voyage, must attach to the earlier.

THE "PETERHOFF."

Temp. 1863.

[BLATCHFORD'S PRIZE CASES, 463 ; 5 WALLACE, 28.]

Case.] During the American Civil War, the "Peterhoff," a British vessel, was captured by a United States cruiser, whilst on a voyage from London to Matamoras, a neutral port on the Mexican side of the Rio Grande. The cargo consisted of goods partly contraband. Condemnation was asked for by the captors, on the ground that the goods were to be carried in lighters up the river, and then transported into the territory of the Confederate States.

Judgments.] Betts, J., in giving judgment, laid down that if the voyage of the ship was an honest one from one neutral port to another, and she was carrying neutral goods between those ports only, she was not liable to capture ; but if her voyage was a simulated one and she was carrying contraband really destined for the use of the enemy, and to be introduced into the enemy's country by transshipment into other vessels at the mouth of the Rio Grande, then both the ship and her cargo were liable to seizure and condemnation. After reviewing the facts of the case, he pronounced both ship and cargo liable.

An appeal was then taken to the Supreme Court. Chase, C.J., in delivering judgment, intimated, in the first place, that in the opinion of the Court the voyage of the ship was not simulated.

He then proceeded to deal with a contention of the captors that the destination of the cargo was in breach of the blockade of the Rio Grande ; on this point the Court refused to adopt the view put forward by the captors that the mouth of the river was included in the blockade of the ports of the rebel States ; and on this point both ship and cargo were pronounced clear of liability.

The next question considered was whether the alleged ulterior destination of the cargo to the rebel region by way of inland navigation or transport, rendered it liable to condemnation. After an examination of those authorities on the subject, which recognised the lawfulness of neutral trade to or from a blockaded district by inland navigation or transport, it was held that the trade from London to Matamoras, even with the intent to supply goods to Texas by means of such transport, could not be deemed a violation of the coast blockade; and on this point, also, it was held that both ship and cargo were free from liability.

On the further question, as to the liability of that part of the cargo which consisted of contraband, it was laid down that, although articles not contraband might be sent to Matamoras and thence to the rebel regions where the communications were not interrupted by blockade, yet contraband goods destined in fact for the rebel States, or for the use of the rebel military forces, were liable to condemnation, although primarily destined to Matamoras. That portion of the cargo, therefore, which was of a contraband character was condemned, together with so much of the rest of the cargo as belonged to the same owners. The remainder of the cargo and the ship were restored; but as it appeared that the captain had destroyed certain papers just before the capture, the Court decreed payment of costs and expenses against the ship, as a condition of restitution.

The Peterhoff, Blatchford's Prize Cases, 463; 5 Wallace, 28.

To have pronounced both ship and cargo liable on the ground of a presumed intention to evade the coast blockade by transporting the goods from neutral territory, by way of inland navigation and carriage, to an ultimate destination in the Confederate territory, could only have been the result of blind prejudice; and this view was properly corrected by the Supreme Court. Even modified as it was by the Supreme Court, the decision in this case carries the application of the doctrine of Continuous Voyages rather far. The result goes to show that, in the view of the United States

Prize Courts, goods in the nature of contraband, even though destined for a neutral port, are liable, if there is any ground on which to found a presumption that they are subsequently to be transported from neutral territory into that of the other belligerent.

Meanwhile, before the judgment of the lower Court had been reviewed by the United States' Supreme Court, a judgment on the same facts was delivered by the Court of Common Pleas in England, in the case of *Hobbs v. Henning* (34 L. J., C. P. 117). In this case an action was brought on a policy of insurance on goods on board the "Peterhoff." The defendant set up a plea to the effect that the goods were contraband of war, and were shipped for the purpose of being imported into a port of the Confederate States then at war with the United States, and were liable to be seized, and were in fact seized and condemned by the United States as contraband of war, and that the insurers were ignorant of these facts at the time of subscribing the policy. To this plea the plaintiff demurred. It was held that the plea showed no defence to the action. Erle, C. J., in giving judgment, after showing that the plea was deficient in point of form so far as the defence of concealment of material facts was concerned, went on to consider the effect of the allegation that the goods were intended to be shipped to an enemy's port. This he held was an allegation of mental process only; the Court could not assume from this, that the plaintiff had made any contract or provided any means for the further transmission of the goods into the enemy's State; if the goods had been in course of transmission to an enemy's port, the voyage might not have been covered by the policy; but in the present case the fact that the plaintiff made the consignment to Matamoras for mercantile profit, was quite consistent with the expectation he might have had that the goods would in reality be purchased by the Confederate States; if this were so, then, although the goods were fit for use in war, yet as passing between neutrals they were not justly liable to seizure; to warrant this they must be taken *in delicto*, that is, in the actual prosecution of a voyage to the enemy's port.

VISIT AND SEARCH.—CONVOY.

THE "MARIA."*Temp. 1799.*

[1 C. Rob. 340.]

Case.] The "Maria" was a Swedish vessel having on board a cargo of pitch, tar, hemp, deals, and iron. The vessel was with others under the convoy of a Swedish frigate. War prevailed at the time between France and Great Britain. A British squadron having proposed to exercise the right of search over the vessels under convoy, the Swedish war-ship intervened and refused to allow this, whereupon the whole convoy was captured by the British, and the "Maria" and other vessels composing it, were brought in for adjudication.

Judgment.] Sir William Scott, in his judgment, laid down that the right of visit and search in regard to merchant-ships was an incontestable right of a belligerent, and that this right could not be varied by the authority of the neutral State being forcibly interposed. Two Sovereigns might agree that the presence of an armed vessel with their merchant-ships should be mutually understood to imply that nothing was to be found in the vessels under convoy inconsistent with amity or neutrality; but no Sovereign could compel the acceptance of such security by force. The only security which the belligerent possessed independently of such special agreement was the right of visitation and search. The penalty for the contravention of the right was confiscation of the property withheld from its exercise. No special circumstances existed in the opinion of the Court to take the case out of the ordinary rule, and the ship and cargo were condemned.

The Maria, 1 C. Rob. 340.

During war between two States, other States have a right to carry on commerce as usual, subject to certain exceptions. These are the

carriage of contraband, the violation of blockade, the violation of the Rule of the War of 1756, and formerly the carriage of enemy goods on neutral vessels. In order to enable belligerents to ascertain that such excepted traffic is not being engaged in, belligerents are endowed with the right of visit and search. This involves a right on the part of a public vessel belonging to either belligerent, to stop a neutral merchant vessel and examine her papers and even her cargo. This right can only be exercised over merchant vessels, and must be exercised only so as to attain the object sought after and nothing more; any unnecessary violence or delay will be a ground for compensation. But subject to this the neutral is bound to submit. This right may be exercised in the belligerent's own waters, or in those of the enemy, or on the high seas, but not in the ports, harbours, or territorial waters of a neutral. The method of exercising this right is for the belligerent to fire a cannon-shot, called by the French *sémonce* or *coup d'assurance*, and by English writers "the affirming gun." If the neutral fails to comply with the order to submit herself to this right of visit and search, any subsequent damage or loss will be regarded as the consequence of his own misconduct, the penalty for resistance being the confiscation of the property involved.

At times it has been arranged by treaty between belligerents and neutrals, that the presence of a neutral war-ship among a fleet of traders should procure for the latter exemption from visit and search. This is what is known as the right of convoy. It was later sought to enforce this right without treaty. Great Britain refused to admit this pretension, and in the case of the Swedish convoy subjected the whole fleet to confiscation for resisting visit and search. In 1800, during war between Great Britain and France, Denmark being at that time neutral, an English vessel proposed to exercise the right of search over six merchantmen under convoy of the Danish frigate "Freya." The exercise of the right was resisted by the latter vessel on the ground of the ships being under convoy. Hostilities ensued, and the "Freya" was captured. No treaty on the subject existed between the two countries, and an open rupture appeared imminent. In the event, after some negotiation, the "Freya" was released by the British authorities, Denmark on her part undertaking, by convention, not to insist on the right of convoy until some definite arrangement on the subject was made (*t*). The matter, as between Great Britain and Denmark, was subsequently regulated by the Convention of June, 1801, to which Denmark acceded, as mentioned below.

Meanwhile several other States had leagued together with the object of forcing on Great Britain certain milder principles of Inter-

(*t*) See Ortolan, Vol. ii., Annexe E.

national Law, in regard to the exercise of belligerent rights over neutral commerce, amongst which was the right of convoy. By the second Armed Neutrality of 1800, to which Russia, Denmark, Sweden, and Prussia were parties, it was agreed that a declaration by the officers in charge of a convoy, to the effect that the vessels under convoy had no contraband on board, should exclude the belligerent right of visitation and search ; but this Convention can scarcely be regarded as an enunciation of the existing International Law on the subject. The matter, however, was settled, as between Great Britain and Russia, by the Convention of June, 1801. By that Convention, to which the other Northern Powers subsequently acceded, it was provided :— (1.) That the right of search should only be exercised by war-ships, and should not be extended to privateers ; (2.) That the owners of merchantmen should produce their passports and certificates to the commander of the convoy before being allowed to sail under convoy ; (3.) That the convoy and merchant-ships should keep out of cannon shot if possible, and that for the purpose of making a search a boat should be sent by the belligerent to the convoy ; (4.) That no search should be made if the papers were in form, and there was no good motive for suspicion ; in the contrary case the commander of the convoy was to detain the merchantman for sufficient time to allow of search, which was to be made in the presence of officers selected by the commanders of both the belligerent and the convoying vessels ; (5.) If there appeared sufficient reason for making further search, notification of the intention to do so was to be made to the commander of the convoy, the latter having the right to appoint an officer to remain on board and assist at the examination ; the merchant-ship in such case was to be taken as soon as possible to the nearest and most convenient port of the belligerent, and the search was to be made with all possible dispatch ; (6.) If a merchantman under convoy should be detained without sufficient cause, the commander of the visiting ship should not only be bound to make compensation, but should suffer further punishment for every act of violence committed ; on the other hand, a convoying ship should not be allowed to resist by force the detention of a merchantman.

But independently of treaty, a merchant-ship is still not entitled, according to the rule of the English Prize Courts, to claim exemption from the belligerent right of visit and search on the ground of being under convoy. By the municipal regulations of France, Germany, Austria, Italy, and the Baltic Powers, however, it is provided that on a declaration being made by an officer of the convoying vessels, all merchant vessels under convoy shall be exempt from visit and search (u).

(u) As to the formalities to be observed in case of visit and search, see Hall, pp. 732—734.

Some question has been raised as to whether there exists in time of peace a right of visit (*droit d'enquête du pavillon*) for the purpose of ascertaining a vessel's nationality and that she is what she professes to be, as distinct from the full right of visit and search that avails in time of war. Both Kent and Phillimore support the view that there is such a right (x). In 1841, a serious controversy took place on this subject between Great Britain and the United States. Great Britain in the course of her operations against the slave trade claimed a right of visit, within certain latitudes, as distinct from a right of visit and search. The United States protested against the exercise of this right in respect to American vessels, on the ground that it was substantially the same as the right of visit and search exercised by a belligerent, and was therefore confined to times of war; that the exercise of such a right in time of peace was likely to prove a fruitful cause of loss and oppression, for which costs and damages might prove an uncertain and inadequate remedy. The matter in dispute, so far as the conduct of operations against the slave trade was concerned, was subsequently regulated by the Treaty of Washington 1842, by the Treaty of Washington 1862, and by the Convention of 1870 (y). If it be the rule, as is commonly admitted, that every vessel sailing on the high seas, even in time of peace, must be provided with the necessary documents evidencing her nationality and identity, it would seem to follow that she ought to be subject, under circumstances of reasonable suspicion, to a right of visit on the part of public vessels belonging to another nation, one of whose recognized duties it is to keep the police of the seas. The distinction between a right of visit exerciseable in time of peace for this purpose, and a right of visit and search in time of war for the purpose of enforcing the neutral obligation, is at any rate one, which if not fully recognized by maritime practice, at least deserves such recognition. In cases of suspected piracy, or where a vessel is suspected of aiding rebels, the recognition of such a right is essential (yy). It appears to be admitted, moreover, that both visit and search may be exercised on the high seas, and in time of peace, in regard to a vessel chased out of jurisdictional waters on suspicion of having violated the revenue laws of the State from whose territory she has escaped.

(x) See Kent's Commentaries, i., 163; Phillimore, III., 524.

(y) See p. 128, *supra*.

(yy) On this subject, see the case of the *Mariana Flora*, p. 65, *supra*, and the case of the *Virginus*, p. 135, *supra*.

THE "FANNY."*Temp.* 1814.

[1 Dods. 443.]

Case.] In this case, a question as to the immunity of neutral property found on board an armed vessel of the enemy, came under the consideration of the English prize courts. During war between Great Britain and the United States, a British armed ship sailed under convoy with a cargo from Liverpool to Rio de Janeiro. The master there increased his crew, for the purpose of fighting his way home without convoy, which he had obtained permission to do. The ship was also furnished with a letter of marque. On her return journey, in April, 1814, with a cargo consisting partly of Portuguese property, she was captured by a United States cruiser after a severe fight, but was subsequently recaptured by the British. Salvage was claimed by the re-captors in respect of the Portuguese property, on the ground that the property would have been liable to condemnation by the United States Courts, as having been found on board an armed vessel of the enemy. This claim was resisted by the Portuguese owners, who contended that neutral property was not generally liable to salvage, and that the onus of making out the exception to the general rule was on the party setting up the claim.

Judgment.] The case came before Sir William Scott, who in giving judgment remarked, that the ship was manifestly a vessel of war. A neutral subject might put his goods on board a merchant vessel belonging to one belligerent, without giving the other belligerent a right to condemn the property. But if the neutral put his goods on board an armed vessel, he betrayed an intention to resist visitation and search, and so far as he did this he adhered to the belligerent. The learned Judge went on to say that, if a neutral acted in association with a hostile force, and relied upon that force for protection, he became *pro hac vice* an enemy. He could not entertain a

doubt that the Americans might, upon just and sound principles, have condemned the property. The usual salvage to the re-captors was accordingly decreed.

The Fanny, 1 Dods. 443.

It has already been pointed out (z) that under ordinary circumstances neutral property, not being contraband, found on board an enemy's merchant vessel is not liable to condemnation (a). In the case of the *Catherina Elisabeth* (5 O. Rob. 232) this was held to be so, even though the enemy vessel had resisted capture. But in the case of the *Fanny*, Sir William Scott refused to extend this immunity to the case of neutral property embarked on board an armed vessel of the belligerent. Such conduct on the part of the neutral was held to render the property liable, on the ground of a presumed intention on the part of the neutral to resist the exercise of his right of visit and search by the other belligerent, and as identifying the neutral *pro hac vice* with the enemy. This appears still to be the doctrine of the British Prize Courts.

In the case of the *Nereide* (9 Cranch, 388), however, the Supreme Court of the United States held, under somewhat similar circumstances, that a neutral might lawfully employ a belligerent armed vessel to transport his goods, and that such goods did not lose their neutral character by reason of the armament, nor by the resistance, provided the neutral himself did not take part in the armament or the resistance; it was suggested that the case would be the same even though the neutral had chartered the whole vessel. Story, J., however, in a dissenting judgment, expressed the opinion that such a course rendered the property liable to condemnation; the learned Judge refused to admit that a neutral was at liberty to charter an armed vessel belonging to one belligerent and to victual and to man her with a belligerent crew, with the intent that she should resist the other belligerent, or to stipulate for the benefit and use of an enemy's convoy, and then to claim an exemption from liability in respect to the other belligerent; such conduct appeared to him altogether irreconcilable with the obligations of a neutral, and would justly subject the property involved to confiscation.

(z) See p. 293, *supra*.

(a) Except, of course, in the event of its being contraband, or engaged in an

attempt to violate blockade or in other acts of unneutral service.

DISPUTE BETWEEN DENMARK AND THE UNITED STATES.

Temp. 1810.

[WHEATON, BY LAWRENCE, 858.]

Case.] In 1810, during war between Great Britain and Denmark, several United States vessels employed in the carriage of naval stores between American and Russian ports placed themselves under the convoy of British men-of-war for protection during the voyage across the Atlantic. The Danish Government thereupon issued an ordinance declaring all neutral vessels placing themselves under hostile convoy, subject to condemnation. Several United States ships were captured on their return voyage, in accordance with the ordinance.

Remonstrances were thereupon addressed by the United States authorities to the Danish Government. According to the United States' contention a neutral might use any means short of fraud or force in order to escape from visit and search; the fact of putting himself under convoy was an open act and therefore not a fraudulent one; in order to implicate the neutral in the matter, it was necessary that there should be actual resistance. To this Denmark replied, that the mere fact of manifesting a settled intention to resist was equivalent to actually resisting; that one who put himself under protection of an enemy's convoy ranged himself on the side of the protector, and thus put himself in opposition to the enemy of the protector; and that by such action he evidently renounced any advantage which attached to the character of a friend to him against whom he sought protection.

Ultimately, after negotiations lasting over twenty years, an indemnity was agreed to be paid by the Danish Government.

Dispute between Denmark and the United States,
1810; Wheaton, by Lawrence, 858.

The result of this dispute appears to favour the principle contended for by the United States; although it was expressly stipulated by the Convention, under which the indemnity was paid, that this concession by Denmark should not operate as a precedent. Mr. Justice Story, however, in the case of the *Nereide* (b) expressed the view that the act of sailing under a belligerent convoy was of itself a violation of neutrality, that both ship and cargo, if taken *in delicto*, would be justly confiscable, and that if resistance were necessary to complete the offence, the resistance of the convoy must be deemed the resistance of the associated fleet. The opinions of text-writers, such as Woolsey, Dana, Kent, and Ortolan, also favour this view. Having regard, therefore, to the saving clause contained in the Convention, to the authority of Mr. Justice Story, and to the opinions of leading writers on International Law, there certainly seems a balance of authority in favour of the view that the use of belligerent convoy on the part of a neutral would justify the seizure and condemnation of the property involved by the other belligerent.

ANGARY.

SINKING OF ENGLISH VESSELS.

Temp. 1871.

[ANNUAL REGISTER, 1871; PUBLIC DOCUMENTS, 255—259; PARLIAMENTARY PAPERS, 1871, VOL. LXXI.]

Case.] During the Franco-Prussian War of 1870, six British vessels lying in the Seine, near Duclair, were seized and sunk in the river by the Prussian troops, with the view of blocking up the channel and preventing French gunboats from interfering with the German military operations.

Some protest was made by the English Government, but the seizure was justified by Prince (then Count) Bismarck on the ground of necessity, which even in time of peace might render the employment or destruction of foreign property admissible under the reservation of the payment of a proper indemnity. After some correspondence the German Government agreed to

See p. 346, *supra*.

pay a sum of money by way of indemnity. This indemnity included—(1.) The value of the ships and 25 per cent. in addition, the seizure being considered in the light of a forced sale ; (2.) The highest value of the cargoes, at the place of shipment, and at the time of capture, less port dues and charges for unloading, which had not been paid ; (3.) Small sums incurred for protests and counter-certificates ; (4.) Five per cent. interest on the sums so ascertained.

A claim was also made by the master and seamen for loss of employment and effects, but the British Government refused to put forward any claim on this ground.

Another claim was made for charges incurred by the British Government in transmitting the seamen to their homes. This was admitted by both sides as fair.

Sinking of English Vessels, Annual Register, 1871 ;
Public Documents, 255—259 ; Parliamentary
Papers, 1871, vol. 71.

The *jus angariae* in its present application consists in the right of a belligerent to seize the property, even of a neutral, found within the belligerent jurisdiction, and to make use of it for the purpose of war-like operations, subject, in the case of a neutral, to payment for any loss or injury sustained. In the same war, the Germans also seized in Alsace between six and seven hundred railway carriages, the property of the Central Swiss Railway, and also some Austrian rolling stock, detaining them for military use throughout a considerable period of the campaign. This right appears, in fact, to be no more than a particular application of the general right which a State has to appropriate all property, foreign or domestic, found within the limits of its jurisdiction or occupation, for purposes dictated by public necessity. To attempt to deny or suppress the exercise of the right, in such cases, would be futile. One can only say, that so far as neutral property is concerned, its exercise ought to be founded on great military necessity, and that a proper indemnity ought to be paid.

APPENDIX.

SOME INTERNATIONAL DISPUTES.

I.

THE BRITISH AMERICAN FISHERIES QUESTION.

[BRITISH AND FOREIGN STATE PAPERS, VOL. VII; PARLIAMENTARY PAPERS, 1855, VOL. LV.; 1874, VOLS. LXXIV. AND LXXV.; 1878, VOL. LXXX.; 1888, Vol. CLX.]

By the Treaty of 1783, upon the recognition of the Independence of the United States, Great Britain conceded to the inhabitants of the United States the right to take fish of every kind on the Grand Bank and other banks of Newfoundland, in the Gulf of St. Lawrence, and in all other places where the subjects of Great Britain were wont to fish before the separation of the two countries; but this was not to extend to the right to land for the purpose of drying or curing fish. The right to fish was further extended to the coasts, bays, and creeks of all other British possessions in America; and, within those limits, there was also granted the right to dry and cure fish in any unsettled bays, harbours, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same should remain unsettled.

After the war of 1812, a dispute arose as to whether the privileges accorded by this treaty had been abrogated by the war. It was contended on behalf of the United States that the effect of the treaty was not to convey new rights or privileges, but to acknowledge and confirm those existing rights of fishing which had been enjoyed by the subjects of the United States before the separation of the two countries; moreover, that these were real rights, and consequently unaffected by any subsequent outbreak of war. In the latter characteristic the acknowledgment of such rights was said to be similar to the acknowledgment of the Independence of the United States. The United States plenipotentiaries stated that from the nature of the rights and the peculiar character of the Treaty of 1783, no further stipulation had been deemed necessary by the United States Government to entitle them to enjoyment of the rights.

Great Britain, on the other hand, asserted that the claim of one State to occupy any part of the territory, or fish in the territorial waters of another, could only rest upon convention. Neither could she assent to the proposition that such a treaty could not be abrogated by a subsequent war; or that the present case constituted any exception to the general rule by which all treaties were put an end to by a subsequent war between the same parties. Great Britain refused to give her diplomatic relations with one State a different degree of permanency from that governing her relations with other States. Moreover, the rights given by the treaty had all the features of temporary concessions; nor did it follow that, even if some parts of a treaty were irrevocable, the whole of the treaty was so.

Some further correspondence passed between the two Governments on the subject, and ultimately Lord Castlereagh stated to Mr. Adams that the orders given to the British Commissioners to prohibit the exercise of such rights by United States citizens, would be suspended, in order that a treaty might be arranged. In the result, a Convention was entered into between the two countries on the 20th October, 1818, to the following effect:—(1.) That the inhabitants of the United States should have for ever, in common with British subjects, the liberty to take fish of every kind, on those parts of the coast specified in the treaty; (2.) That United States fishermen should have liberty for ever to cure fish, on the unsettled bays of certain parts of the coast of Newfoundland and of the coast of Labrador, but so soon as the same should be settled it should not be lawful for them to cure fish on such parts without previous agreement; (3.) The United States renounced the right of fishing on other parts of the coast of British North America, but American fishermen were to be admitted to the bays of those parts for the purpose of shelter, repairing damages, purchasing wood, and obtaining water, subject to such restrictions as might be necessary to prevent their abusing the privileges reserved to them.

In 1849, in consequence of a petition presented to the Crown by the Canadian Parliament, negotiations were commenced between Great Britain and the United States, with a view to the granting to the citizens of the United States access to the fisheries of all the colonies (except Newfoundland), in return for reciprocity of trade with the United States in all natural productions. Ultimately, on the 5th of June, 1854, a new Treaty was entered into between the two Governments, whereby it was provided:—(1.) That the inhabitants of the United States should have the right of taking fish of every kind except shell fish off the coasts of Canada, New Brunswick, Nova Scotia, Prince Edward's Island and the islands adjacent thereto, and also the right of landing on the shores of those colonies and of the Magdalen Islands, for the purpose of drying

their nets and curing fish, provided that they did not interfere with rights of private property or with British fishermen ; (2.) But such rights of fishery were not to extend to salmon or shad fisheries or any river fisheries ; (3.) In case of dispute, the matter was to be settled by arbitration as provided in the treaty ; (4.) British subjects were to have the right to take fish of every kind, except shell fish, on certain parts of the eastern coast of the United States, with permission to land for the purpose of drying their nets and curing fish, provided that they did not interfere with rights of private property or with United States fishermen ; (5.) Salmon and shad fisheries and all river fisheries were similarly excepted from the privileges granted to British subjects. Provision was made for the appointment of commissioners to examine the coasts of North America, and designate the places reserved from the common right of fishing.

In 1870 a question arose with reference to the extent of the rights of fishery possessed by the two nations. The subject was dealt with anew by the Treaty of Washington of the 8th of May, 1871. This treaty provided : (1.) That United States citizens should have the right to take fish of every kind, except shell fish, off the coasts of Quebec, Nova Scotia, New Brunswick, and Prince Edward's Island, and the islands adjacent thereto, without restriction as to distance from the shore, with permission to land there and also upon the Magdalen Islands for the purpose of drying their nets and curing their fish, provided they did not interfere with the rights of private property, or with British fishermen using the coasts for the same purpose ; (2.) Similar privileges were given to British subjects on the east coast of the United States north of 39° N. lat., and the islands adjacent thereto ; (3.) These privileges were to last for ten years, and also for a further period of two years after notice to terminate by either party ; (4.) Inasmuch as the privileges accorded to the United States, were alleged by Great Britain to be greater than those accorded to her, provision was made for settling by arbitration the amount of compensation, if any, to be paid to Great Britain in respect of this alleged inadequacy of consideration.

Certain commissioners were appointed in pursuance of this provision, and met at Halifax in Nova Scotia. Their meetings extended from the 15th of June to the 23rd of November, 1877. The sum of \$5,500,000 was awarded by them to Great Britain as compensation.

The provisions of the Treaty of Washington on this matter were to remain in force for 10 years, and thereafter to continue until notice to abrogate was given by either party, although such notice was not to take effect until two years had elapsed from the time at which the notice was given. In pursuance of this option, the United States Government terminated the arrangement in 1883, with the

result that in 1888 both parties were relegated back to the provisions of the treaty of 1818. The provisions of this treaty were now very strictly construed and enforced by the Canadian Government. This gave rise to considerable friction between the British and United States Governments. In 1887 an attempt was made to effect an amicable settlement. Three commissioners were appointed to arrange the matter, and a provisional treaty was come to in 1888, by which a mixed commission was appointed to delimit the waters of Canada and Newfoundland, as to which the United States Government had renounced its rights. It was also provided that the marine league, within which exclusive rights of fishery usually belong to the local power, should be measured from low water mark, or in the case of bays and gulfs not being more than 10 miles across, then from a straight line drawn from headland to headland. This treaty, however, fell through owing to the refusal of the United States Senate to ratify it.

The British American Fisheries Question, British and Foreign State Papers, Vol. VII.; Parliamentary Papers, 1855, Vol. LV.; 1874, Vols. LXXIV. and LXXV.; 1878, Vol. LXXX.; and 1888, Vol. CIX.

II.

THE MOSQUITO PROTECTORATE QUESTION.

[PARLIAMENTARY PAPERS, 1856, VOL. LX.; 1860, VOL. LXVIII.]

The Mosquito Territory, a portion of Central America lying between Honduras, Nicaragua, and Costa Rica, had long been under the protectorate of Great Britain. Some attempts were made to found colonies and settlements, but from various causes the British colonists were compelled to withdraw. After the overthrow of the Spanish power in Central America, various native States came into existence. In 1840 a series of internal struggles broke out within the territory, which ultimately led to British interference. On the 1st of January, 1848, a British force hauled down the Nicaraguan flag from San Juan, and raised the Mosquito flag in its place. Apprehension was then expressed on the part of the United States, lest Great Britain should monopolise for herself the control over the different routes between the Atlantic and Pacific Oceans.

Some correspondence took place between the two Governments, the result of which was that, in 1850, the Clayton-Bulwer Treaty was entered into between Great Britain and the United States. By this Treaty each party agreed not to occupy, fortify, colonise, assume or

exercise dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America, or to make use of any protection or alliance which either party might enjoy, for the purpose of so doing (a).

Subsequently the United States requested the withdrawal of the British protectorate over the Mosquito Indians in accordance with the provisions of the treaty. To this request the British Government replied by pointing out that, up to the end of 1849, the United States Government had made no remonstrance to Great Britain on the subject of her protectorate of the Mosquito territory; that the treaty of 1850 only applied to future acquisitions, and was not meant to annihilate the existing protectorate, but simply to confine its powers and limit its influence, so as to prevent Great Britain from acquiring absolute control over the proposed Panama Canal; and finally, that the very words of the treaty in limiting the conditions of occupation showed that some occupation was in fact contemplated.

The United States replied, that on account of the savage and degraded state of the Mosquito Indians no protectorate proper could exist on the part of Great Britain in regard to them; that the nominal protectorate must involve an absolute submission on their part, to the British Government; and therefore Great Britain must be treated as being in possession of the Mosquito Coast as undisputed owner; this being so, she was bound by the treaty to withdraw.

A very long correspondence ensued on the subject. Ultimately, on the 28th of November, 1859, a treaty was concluded between Great Britain and Honduras, whereby it was agreed that the country formerly occupied by the Mosquito Indians within the Honduras frontier, should be recognised as belonging to Honduras, and that the British protectorate over it should cease. Arrangements were also made for the appointment of commissioners to enquire into the claims of British subjects with reference to the matter.

By this means the question between Great Britain and the United States was for the time set at rest (b).

The Mosquito Protectorate Question, Parliamentary Papers, 1856, Vol. LX.; 1860, Vol. LXVIII.

(a) For an account of the other provisions of the Clayton-Bulwer Treaty relating to the construction of a waterway across Central America, see p. 28, *supra*.

(b) For an account of the recent

dispute and correspondence between the United States and Great Britain as to the effect of the Clayton-Bulwer Treaty on the proposed Panama Canal, see p. 29, *supra*.

III.

THE MAINE BOUNDARY QUESTION.

[BRITISH AND FOREIGN STATE PAPERS, VOL. XXX., pp. 136—181.]

By the Treaty of 1783, between Great Britain and the United States, provision was made for the settlement of the boundaries between the State of Maine and the Province of New Brunswick. Difficulties subsequently arose in consequence of a reference in the Treaty to certain highlands which had no definite existence. The King of Holland, to whom the matter was referred, stated that it was impossible to execute the provisions of the Treaty relating to the subject. A boundary Convention was subsequently made, but it was not ratified by the United States Senate. A discussion on the subject, lasting over many years, having proved ineffectual, in 1842 Lord Ashburton was sent out by the British Government, with the view of arranging a conventional line of boundary between the two territories. According to the British Government, the principles to be observed in the settlement of such disputes were:—(1.) The establishment of a good boundary between the countries, but with an unobstructed communication and connection of the British colonies with each other; and (2.) That each nation should keep under its jurisdiction such inhabitants as had been so living for any length of time. The United States Government, in stating their view of the matter, urged that a boundary line could be fixed in accordance with the stipulations of the Treaty of 1783. Eventually, after some correspondence, the boundary was arranged, and the result ratified by Treaty (c).

The Maine Boundary Question, British and Foreign State Papers, Vol. XXX., pp. 136—181.

(c) The Maine Boundary Question has been inserted as containing an important statement of the principles which should be observed in the settlement of boundary disputes. It has been thought unnecessary to refer to the respective contentions of the two

countries as to the actual territorial limits in dispute, with which the correspondence on the subject is mainly taken up, but which would be unintelligible without the aid of a map of the locality.

IV.

THE OREGON CLAIMS.

[PARLIAMENTARY PAPERS, 1846, VOL. LII. ; 1873, VOL. LXXIV.]

In 1844, differences arose between Great Britain and the United States, with reference to the Oregon territory. The latter Power claimed the whole of the district drained by the Columbia river, and the whole territory west of the Rocky Mountains as far as parallel 54° 40' N. In a dispatch, dated the 3rd September, the American plenipotentiary stated that the United States' claims to the district were founded partly on pretensions put forward in their own proper right, and partly on pretensions derived from France and Spain. Their own proprietary claims against Great Britain were founded on priority of discovery, exploration, and settlement ; their claim to discovery rested on that of Captain Gray, a United States citizen, who had passed the bar and anchored in the river Columbia ten miles above its mouth on the 11th of May, 1792, and had afterwards sailed even farther up the river. As to the alleged previous discovery on the part of one Meares, a British subject, in 1788, it was asserted by the United States that Meares had expressly declared, in his account of the voyage, that there was no river as laid down in the Spanish chart. It was also alleged that Vancouver, who explored the coast in April, 1792, had failed to discover the river. With reference to priority of settlement, it was stated that establishments were formed there by American citizens as early as 1809 and 1810. In further support of their contention, the United States relied on the claims of France and Spain, to which the United States had succeeded under treaty. It was alleged that the river had been discovered as early as 1775, by a Spaniard called Heceta, that the rights arising from prior discovery ought to extend to the entire region drained by the river, and that such rights were transferred to the United States by the Treaty of Florida, 1819. With reference to the claims derived through France, it was alleged that by the Treaty of 1763, between that country and Great Britain, the latter country had ceded to France all her claims in respect of the region to the west of the Mississippi, and that those claims had been transferred from France to the United States, by the Treaty of Louisiana, 1803.

To this statement the British plenipotentiary replied on the 12th of the same month, that the district in question never belonged to France, and was therefore not comprised in the Treaty of Louisiana. As to the Treaty of Florida, Spain had by previous treaty with Great Britain, dated 1790, acknowledged in Great Britain certain rights with respect to those parts of the Western coast of America not

already occupied, the acknowledgment having special reference to the territory in question. In support of the British claim stress was laid on the discoveries of Meares and Vancouver, and other Englishmen, who had made explorations inland. As to priority of settlement, a trade establishment had, it was true, been formed by American citizens in 1811 : but it had passed, during the war, into the hands of British subjects, and was only restored to America in 1818 by an understanding between the two Governments.

After a diplomatic correspondence lasting over two years, a Treaty on the subject was entered into between the two countries on the 15th of June, 1846, whereby it was provided that the line of boundary between British and United States territory should be continued westward, along the 49th parallel of north latitude, to the middle of the channel which separated the continent from Vancouver's Island, and thence southwards through the middle of the channel and of Fucas' Straits, to the Pacific Ocean ; the right of navigation in the channel and straits being preserved to both parties.

The matter was not, however, destined to rest here. The commissioners appointed to determine the portion of the boundary running southward, were unable to agree, Great Britain claiming that the boundary line should be run through the Rosario Straits, and the United States claiming that it should run through the Canal de Haro. This dispute gave rise to much correspondence between the Governments of the two countries. Various attempts to settle the matter were made without success. Ultimately, by the Treaty of Washington of 1871, it was agreed to submit this to the arbitration of the Emperor of Germany. The two Governments accordingly submitted their cases to the Emperor, who referred them to three experts. In accordance with the report of the latter, an award was made in favour of the United States' contention. This award was subsequently accepted by Great Britain.

The Oregon Claims, Parliamentary Papers, 1846, Vol. LII. ;
1873, Vol. LXXIV.

V.

THE DELAGOA BAY QUESTION.

Temp. 1872.

[*PARLIAMENTARY PAPERS*, 1875, Vol. LXXXIII.]

From 1823 to 1875, continuous disputes took place between the British and Portuguese Governments with regard to their respective

claims to Delagoa Bay, on the East Coast of Africa. The district in dispute formerly belonged to the King of Tembe and Mapoota. It was contended on behalf of Great Britain :—(1.) That the territories, although discovered by the Portuguese, had never been taken possession of by them, and that the Portuguese dominions were bounded on the south by the Dundas or Lorenzo Marques River and by the English River, and on the east by the sea, and had at no time extended to the territories in question ; (2.) That the whole country south of the Dundas, or Lorenzo Marques River, and English River, had remained free and independent until 1823, the native inhabitants under their chiefs retaining absolute dominion over the territory ; (3.) That the chiefs, with the consent of the natives, had ceded the territory to Great Britain in 1823.

The Portuguese, on the other hand, claimed the territory in question, on the following grounds :—(1.) That the bay and territory around it had been discovered by them as early as the 16th century ; (2.) That they had continued in occupation and possession of the bay for three centuries ; (3.) That the bay formed an approach to Portuguese territory ; (4.) That the territory had been conceded to them by the Emperor of Monomotama in the beginning of the 17th century ; (5.) That a grant had been subsequently made to them by the rulers of Tembe ; (6.) That an express acknowledgment of their rights had been made by the chiefs of the tribes of Tembe and Mapoota ; (7.) That their rights had been acknowledged by European nations ; and (8.) That previously to 1823 their rights had also been acknowledged by the English.

In 1872 the matter was referred to the President of the French Republic, who made his award in favour of Portugal on the following grounds, viz. :—(1.) That the discovery of the bay had been made by Portugal in the 16th century ; (2.) That Portugal had since claimed sovereignty and exclusive rights of commerce over the place, and had maintained her pretensions against other countries, by whom her claims had not been effectually disputed ; (3.) That when England concluded a treaty with Portugal in 1817, she did not contest these rights ; (4.) That in 1822 England recommended Captain Owen, to whom the alleged cession was made, to the good offices of Portugal ; (5.) That although the weakness of the Portuguese authority in 1823 might have induced Captain Owen to consider the territory as independent of Portugal, yet the treaties subsequently concluded were nevertheless contrary to Portuguese rights ; (6.) That almost immediately after the departure of the English, the chiefs of Tembe and Mapoota acknowledged their dependence on the Portuguese authorities ; (7.) That even if the treaties had been made between parties capable of contracting, they would now be of no avail, the treaty relating to Tembe containing conditions that had not been

performed, those relating to Mapoota having been for periods of time that had expired, and not having been renewed.

The Delagoa Bay Question, Parliamentary Papers, 1875,
Vol. LXXXIII.

VI.

THE BEHRING SEA CONTROVERSY (cc).

[PARLIAMENTARY PAPERS, 1890, VOL. LXXXII.]

The Territory of Alaska is a promontory situated on the extreme north-west of the continent of North America, and projecting, in a south-westerly direction, for about 500 miles into the Pacific Ocean. Beyond its extreme point lies the Aleutian archipelago, a series of islets extending for a considerable distance further into the Pacific. Above these lies the Behring Sea, and still farther north lie the Behring Straits, separating the two continents. Both the peninsula of Alaska and the Aleutian archipelago formerly belonged to Russia. In 1867 these dominions were ceded by Russia to the United States; and were constituted a Federal Territory. The value of the territory acquired lay mainly in its being the chief seat of the seal-fishing industry. In 1870, or thereabouts, a small but powerful syndicate, called the Alaska Commercial Company, was formed for the purpose of acquiring from the United States Government a lease of the Pribyloffs and certain other islands, on certain terms and conditions, which included the payment of a royalty on the number of skins taken. The Company not only received a lease of these islands, but subsequently also acquired the control of other groups, and finally extended its operations and control over most of the adjoining islands of the archipelago, as well as over the mainland of Alaska.

Meanwhile, the seal-fishing industry had begun to attract the attention of the Canadians, and Canadian vessels began to be despatched to the Behring Sea for the purpose of seal-fishing. It is an admitted principle that every nation is entitled to exercise jurisdiction along its littoral seas within a certain distance from the coast. The exact nature of this jurisdiction and the exact limits within which it may be exercised have been stated by an English court to be doubtful. See *Reg. v. Keyn* (L. R. 2 Exch. Div. 68). So far as

(cc) For many of the facts contained in the following summary, the author is indebted to two admirable articles on the subject by Mr. T. B. Browning, contained in the *Law Quarterly Review*,

April and October, 1891; for a detailed account of the controversy and a criticism of the American claims, the reader is advised to refer to these articles.

Great Britain is concerned, the doubt raised in *Reg. v. Keyn* has now been settled by the Territorial Waters Jurisdiction Act, 1878 (cc). Apart, however, from the particular question of the true nature of the littoral jurisdiction, it is commonly conceded by the usage of nations that the right of fishing in adjacent waters, probably within three geographical miles from low-water mark, belongs, except where modified by treaty, to subjects of the adjoining State. It is further conceded that, outside these limits, the right to fish on the high seas is a common right, not capable of being appropriated, any more than the dominion of the sea itself, by any particular State. In the Behring Sea difficulty, it does not appear to be suggested that the Canadian fishermen have in any way infringed the littoral jurisdiction and exclusive fishing rights of the United States, as above defined. Their method throughout appears to have been to kill and capture the seals on their passage across the Behring Sea, or, at any rate, at a distance considerably beyond the limit of three geographical miles from the American coast. It is, indeed, charged against them that they indulged in indiscriminate slaughter, calculated to diminish the yield of seals. This may or may not be true. If true, this charge might fairly have been made a matter of diplomatic action for the purpose of procuring Canadian legislation prohibiting this practice to Canadian subjects. In no case, however, could the charge, even if substantiated, become the foundation of a new jurisdiction over a portion of the open sea, altogether unrecognized by prior law or usage.

The operations of the Canadian fishermen necessarily gave umbrage to the Alaska Company, and influence was speedily brought to bear on the United States Government to induce it to intervene. Some attempts were made to secure the intervention of Congress, but these having been unsuccessful, reliance had to be placed on the action of the Executive. At the instigation of the Company, which at each stage of the controversy proved itself to be possessed of most powerful influence at Washington, a series of official Acts was passed tending to set up an exclusive jurisdiction, and culminating in a Proclamation, issued in March, 1886, whereby the waters of the Behring Sea were declared a Federal preserve, and other nations were prohibited from fishing within their limits. In pursuance of this purely official assumption of jurisdiction, from 1886 to 1889 various Canadian vessels were seized by United States revenue cutters, and subsequently condemned in the district court of Alaska; others were searched, their cargoes rifled, their papers abstracted, and their voyage broken up. The trials of the vessels that were sent in for adjudication, were conducted in most irregular fashion, the juries were composed of dependents of the Alaska Company, evidence was impro-

perly excluded, no opportunity was given for cross-examination, demurrers were over-ruled without argument, and after judgment every obstacle was thrown in the way of carrying an appeal to the United States Supreme Court. Meanwhile, the crews were subjected to the harshest possible treatment, and although in some cases orders were subsequently given by the United States Government for the release of the men and for the restitution of the vessels, yet this was done too late to be of any avail. The vessels had become useless, the sentences had in a great measure been undergone; the men, when discharged, were left without funds or friends. Some succeeded in begging their way back, others died after suffering inconceivable hardships. In all that occurred, the tampering with justice, the delays, the harsh sentences, the keeping back of the orders of Government, one traces clearly the hand of the Alaska Company (*d*). Meanwhile, Great Britain had been appealed to on behalf of the Canadian fishermen. In 1890, after several fruitless attempts at an amicable settlement of the difficulty, Great Britain took up a firm stand, and intimated that any further seizures would be resisted. In consequence of this, the United States authorities abstained from making any further seizures, although their Government refused to give any diplomatic assurance that no further seizures would be made. Since then a *modus vivendi* has been arranged, with a view to the whole question being submitted to arbitration.

Such is a brief statement of the main features of the controversy. The question then arises as to whether there is any just foundation in law or usage for the American claim. The grounds put forward by supporters of the American contention are mainly three. (1.) That these waters, although beyond the three-mile limit, are, nevertheless, really land-locked waters, and consequently within the territorial jurisdiction of the United States, just as Conception Bay is within the jurisdiction of Great Britain, or the Zuyder Zee within that of Holland. The answer appears to be that the physical configuration of the coast altogether precludes this view, unless the principles, which at present regulate jurisdiction over territorial waters, are to be entirely remodelled. The rule, as commonly laid down, is that waters which lie inside a straight line drawn from one headland to another are deemed territorial waters, and subject to State jurisdiction; but even this is subject to the limitation which requires such waters to exhibit the conformation of well defined gulfs or bays, and which excludes waters, where the distance from headland to headland is very considerable, the ordinary limit being ten miles, and the greatest distance, as yet admitted, being about 35 miles. In the present case, if a line were drawn from any real

(*d*) For fuller information on this point, the reader is again referred to Mr. Browning's articles, already alluded to, p. 359.

headland on the Alaskan peninsula to any other promontory on the north within United States territory, it would comprise but a small part of the Behring Sea, and would thus fail to bring the area of the operations of the Canadian fishermen within United States jurisdiction. Such a claim, therefore, would not merely be unwarrantable in law, but it would also be insufficient, in fact, for the purposes which prompt the United States to assert their jurisdiction at all. On the other hand, it is scarcely possible to rank the series of islands constituting the Aleutian archipelago, separated as they are from each other by distances in some cases amounting to 20, 40, or even 80 miles, as a prolongation of the peninsula of Alaska, or to regard the outermost of these islands as a headland, for the purpose of constituting a land-locked water. But even if this were admitted the claim would again fail, inasmuch as from the outermost island to the narrowest point of the Behring Straits would give a face or base to the so-called land-locked waters of some 1,500 miles. It is scarcely conceivable that such a contention should be put forward on any alleged basis of right or usage. (2.) Next, it is contended that even if these waters do not constitute land-locked waters within the ordinary meaning of that term, yet they are not, as between Great Britain and the United States, at least, a part of the high or open sea, because under treaties formerly entered into between Great Britain and Russia a right of jurisdiction over them was reserved to the latter country, and conceded by the former; and, further, that all such rights became, by the Russo-American Treaty of 1867, vested in the United States. This contention, however, is altogether denied by those who support the British view. Certain claims to jurisdiction were, it is true, asserted by Russia in earlier days, but such claims were refused recognition alike by Great Britain and by the United States from 1821 to 1824, and were in 1825 wholly abandoned by Russia under a Convention to which Great Britain and the United States were parties. No attempt to revive them was made until this was done by the United States in the Proclamation of 1886. To contend that the Convention of 1825 did not include the Behring Sea, because it was not specifically mentioned when referring to the Pacific Ocean, would be to deprive the treaty of any *raison d'être*. Moreover, if any such rights had remained vested in Russia, some mention of them and their transfer would undoubtedly have been mentioned in the Treaty of 1867. In this Treaty, however, there appears to be no provision whatever for the transfer of any part of the sea, or of any dominion over it; there is no mention of any such rights as belonging to Russia; the cession is confined to the territory and dominion of Russia in and over the continent and the Aleutian archipelago. (3.) The last contention put forward on behalf of the United States is that they have a property in the seals and

fur-bearing animals, by reason of their having been reared and supported on islands which constitute United States territory, notwithstanding that they may stray, and however far they may stray, into the adjoining ocean. The answer to this contention would seem to be, that neither the civil nor the common law recognise any property in wild animals until they are caught, and that if the American doctrine were admitted as to seals, there is no reason why it should not be extended to all the other produce of the seas.

The strongest feature in the American case, is that put forward by Mr. Phelps, when he points to the wholesale destruction involved in the attempted interception of the seals by Canadian vessels at certain periods of the year, on which occasions many of the animals sink and are lost. This, however, is a matter for diplomatic arrangement, and for common legislation. If Canada were unreasonably to object to take some common action, which, whilst duly recognizing the rights of her citizens, would yet prevent any wanton and useless slaughter, then the proper remedy of the United States would be to adopt some method of retaliation.

It appears likely that the principle of arbitration will be resorted to, in order to settle the general question at issue. Meanwhile, it is also probable that the Supreme Court of the United States will have to pronounce a decision on the same question, on the occasion of an appeal, which is now coming on, in the case of the *W. P. Sayward*, one of the Canadian vessels condemned. If the decision in each case should be in favour of the British contention, the existing rules of International Law on the subject of territorial waters and fishing rights will remain unaffected; but if the verdict and award should be the other way, then it would seem that the existing rules on this subject will have to be entirely remodelled; in this case it may become necessary to take some common action with the view of ascertaining by what principles these rights, as between nations at large, are to be regulated, for the future.

The Behring Sea Controversy, Parliamentary Papers, 1890,
Vol. LXXXII.

VII.

THE NEWFOUNDLAND FISHERIES QUESTION.

[PARLIAMENTARY PAPERS, 1891.]

By the Treaty of Utrecht, 1713, the British sovereignty over Newfoundland was definitely and finally recognised as between Great Britain and France. By that Treaty, it was provided that Newfoundland, together with the islands adjacent, should from that time forward belong to Great Britain; that all places within it, then in the possession of the French, should be yielded up; and that the French should not at any time thereafter lay claim to any right to the island or islands or any part of it or them. At the same time, by Article 13 of the Treaty, liberty was reserved to the French to catch, and also to dry fish on land, between Cape Bonavista on the north, and Point Riche on the west; subject to the condition, however, that the French should not fortify any part of the coast or erect any buildings thereon, with the exception of wooden stages and huts commonly used for drying fish, and that they should not resort to the island except at times necessary for catching and drying fish. By the Treaty of Paris, 1763, this arrangement was confirmed. By the Treaty of Versailles, 1783, the territorial limits of the French rights were somewhat modified, so as to extend from Cape St. John on the east, and thence north and west to Cape Ray at the south-west angle of the island. By a Declaration which accompanied the last Treaty, the British Government undertook to adopt measures for preventing its subjects from interrupting in any manner, by their competition, the French fisheries, and that it would, to that end, cause any fixed settlements that were or might be formed within the French limits to be removed. By the Treaty of Paris, 1814, it was declared that the French rights of fishery should be placed upon the same footing as that upon which they stood in 1792. In 1855 responsible government, in its present form, was established in the island, the Colonial Government being invested with every right possessed by Great Britain in Newfoundland and its dependencies.

Meanwhile difficulties and disputes were constantly arising in connection with the exercise by the French of their alleged Treaty rights. The terms of these Treaties were somewhat vague and ambiguous, and this naturally opened up the road to conflicting pretensions on either side. On the one hand, the French fishermen, stimulated by Government bounties and relying on French naval protection, were naturally inclined to push their pretensions to the

uttermost ; on the other hand, the inhabitants of a Colony possessed of responsible government, with equal reason, resented the injudicious arrangements under which an alien nation was admitted to enjoy any exclusive rights within the limits of the Colonial territory. Many places within the limits of the French shore had meanwhile become settled by the British, and Colonial vessels were frequently molested for attempting to fish at stations over which the French claimed exclusive rights. Various attempts were made from time to time to relieve the pressure caused by these chronic contests. In 1884 a Convention was entered into between the British and French Governments for the purpose of providing a satisfactory working arrangement ; but this Convention did not meet with the approval of the Colonial Legislature, mainly because it secured to the French fishermen an absolute right to purchase bait from British subjects along the entire coast of Newfoundland, and hence the arrangement fell through. Indeed, not long afterwards a Bait Act was passed by the Colonial Legislature forbidding altogether the sale of bait to French fishermen.

In the meantime, also, a considerable lobster fishing industry had sprung up in the Colony, and lobster factories were established by the Colonists on different parts of the coast. The French soon followed the example of the Colonists in this respect, and not only asserted their right to engage in the lobster fishery and to establish factories, but also claimed to exclude the English from carrying on that industry, on the plea that such factories injuriously affected French fishermen. The friction caused by this dispute became so great that in 1887 the Colonial Legislature made representations to the Imperial Parliament on the subject of the alleged encroachments of the French. Considerable diplomatic correspondence followed, but without result.

The main issues in the controversy briefly appear to be these :—

(1.) Did the permission granted to the French to fish and dry fish along the prescribed portion of the coast apply to all kinds of fishery, including the lobster fishery, or only to the cod fishery ?

On this subject the terms of the Treaties previously referred to are somewhat vague ; the privilege granted merely extends to the right of catching and drying fish, and erecting certain structures along the coast for that purpose. At the time these Treaties were entered into almost the only fishery pursued was the cod fishery ; there was, at this time, no such established industry in Newfoundland as a lobster fishery, and certainly no such thing as a lobster factory. Moreover, the modes of fishing and curing fish, referred to in the Treaties, are quite inapplicable to lobster catching and to lobster tinning. It is a recognized principle in the interpretation of Treaties that the words used ought to be construed in the sense intended at the time the

Treaty was entered into, and that for this purpose regard must be had to conditions of time and place. If this be so, it would seem that, on the ordinary principles of construction, the French Treaty rights ought to extend to no other rights than those that existed at the time the Treaties were entered into. Inasmuch as these Treaties, moreover, were in derogation of the ordinary rights of territorial sovereignty belonging to the British Government, it would seem that they ought to be kept within the strictest limits that the meaning of the words used allows. If this be so, and if the French fishing rights are in reality confined to the cod fishery, then it would follow that the French are not entitled to take bait fishes, even within the limits assigned to them by Treaty, for any other purpose than the cod fishery; whereas the French claim the right of taking bait for other purposes and for export to outside settlements.

(2.) The second matter in dispute appears to be, whether Great Britain, by granting to French subjects the right of drying fish and cutting wood along certain portions of the coast, and by promising the removal of the fixed settlements referred to in the Declaration accompanying the Treaty of Versailles, 1783, thereby engaged to prohibit British subjects from erecting any building or establishing settlements on that part of the shore, or whether the obligation was merely to prohibit such settlements and enterprises as might reasonably be deemed to interfere with or interrupt the legitimate exercise of the fishing rights granted to the French. Incidentally to this, the question again arises whether the fisheries so exempted from molestation are confined to the cod fishery, or are to be deemed to include the lobster and other fisheries also. The determination of this latter question must depend on the considerations already alluded to under the first head of dispute. On the main question as to the nature of the exemption secured to the French, it would seem that while the French fishermen on the one hand are entitled to all necessary facilities for exercising their fishing rights, there must by implication be deemed to remain vested in the British Government and its subjects all other rights of user and enjoyment in respect to the territory in question. If this be so, then it follows that the British would still be entitled, even along the French shore, to rights of access to and from the sea, and to the use of the shore for all the ordinary purposes of intercourse and business, so long as these do not interfere with the *bond fide* exercise of their fishing rights by the French. The fact, moreover, that express provision was made, prohibiting British subjects from injuring the French sheds and stages, during their owners' absence in the winter months, appears to bear out the view that the presence of British subjects all the year round, on that part of the coast, was anticipated.

(3.) Another question in dispute is this. Assuming that the French

are entitled to exclusive rights in respect even of the lobster fisheries along the prescribed portions of the coast, do the provisions of the Treaty of Utrecht, in prohibiting French subjects from erecting any structures on the shore "except wooden stages and huts commonly used for drying fish," prohibit them from erecting removable lobster factories? On this subject it would seem that if the French contention that their fishing rights do include the lobster fisheries is correct, then the right to erect such removable factories ought to follow. But the argument against such an extended construction of the Treaties appears to be almost conclusive.

Finally, the French have put forward a claim "to fish in and bar the rivers and lakes of the island, and to erect weirs." As to this, it would seem that the French claim is altogether inconsistent with a fair construction of the terms of the Treaties. Both Treaties and Declarations uniformly refer to the rights of fishing granted to the French, whatever these may be deemed to include, as being "on the coast (e)."

Such is, roughly, a statement of the main issues between the two Governments.

In 1890 a *modus vivendi* for the ensuing season was arrived at. Under this it was arranged that, without either country demanding at once a new examination of the legality of the installations of British or French lobster factories on the coast, where the French enjoyed fishing rights, there should be no modification of the positions occupied by the establishments of either country on the 1st of July, 1889, except that a subject of either nation might remove any such establishment to any spot on which the British and French commanders on the station might have jointly agreed; no lobster factory not in operation on the 1st of July, 1889, was to be established along the coast in dispute, unless by the joint consent of the two commanders; but it was to be open to the fishermen of either country to establish a new lobster fishery on some spot to be settled by agreement; in the event of any case of competition arising, the two commanders were at once to proceed to a provisional delimitation, having regard to the situation acquired by the two parties.

This arrangement caused a great outcry in the colony, and many meetings protesting against it were held. Two delegates on the subject were despatched to Great Britain, with the view of bringing the grievances of the inhabitants, more effectually under the notice of the Imperial Parliament. It was contended that unless the claims of the French in reference to the French shore were extinguished, the internal development of the island would be impossible, inasmuch

(e) See an article by Judge Pinsent, *Nineteenth Century*, April, 1890; and on the subject generally, see "Inter-

national Fishery Disputes," by T. H. Haynes, pp. 18 to 21.

as these claims formed a barrier to the settlement of a large, and in some respects the most favoured part of the island ; and that even if the issues immediately in question should find a peaceable settlement, yet as long as the French retained their status in Newfoundland, new causes of dispute would inevitably break out. The buying out of the French claims has been advocated as the most feasible solution of the difficulty. Meanwhile, it has been agreed between the two Governments to refer the matters immediately in dispute to arbitration.

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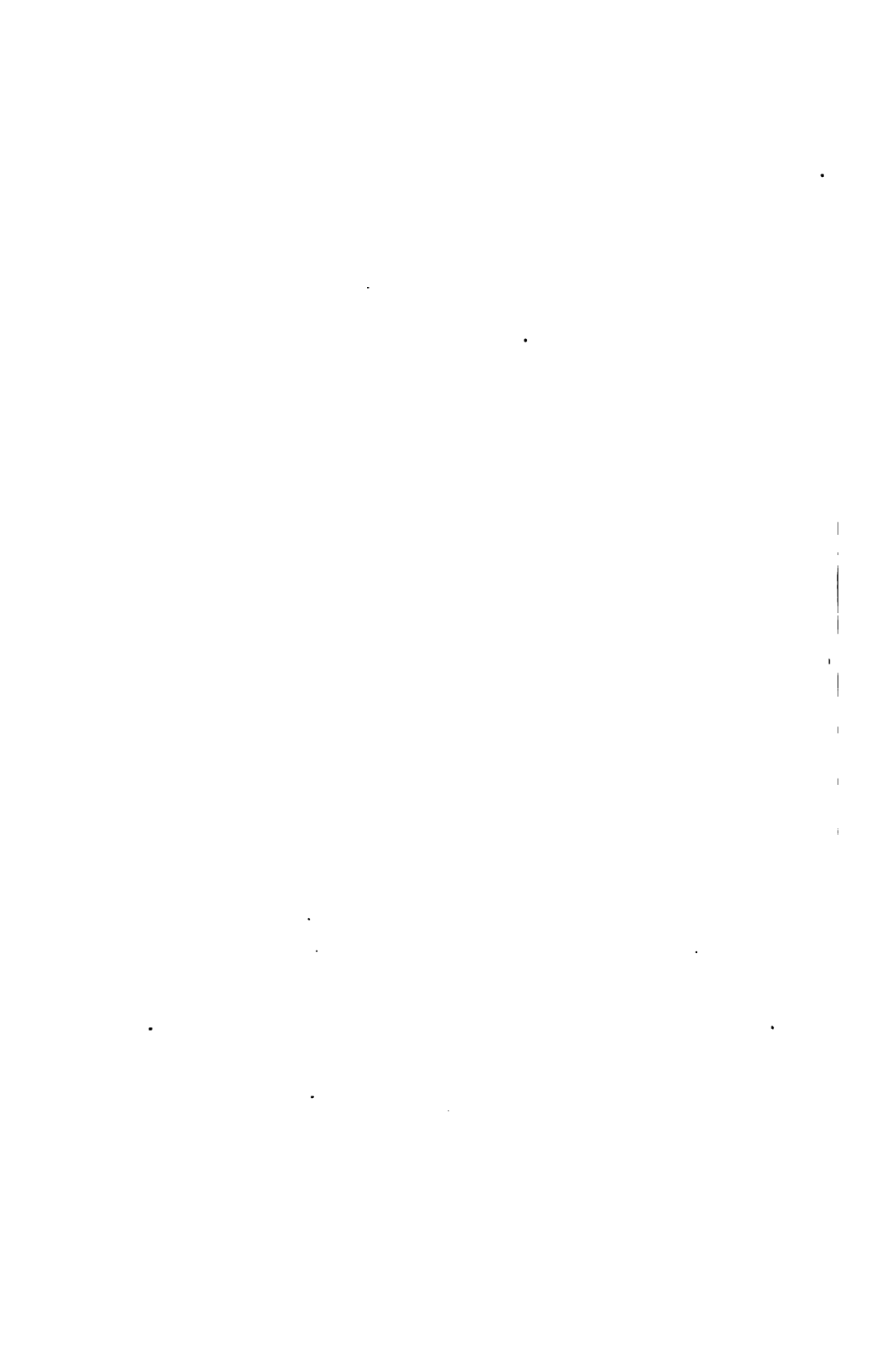
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